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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

NATIONAL EDUCATION ASSOCIATION *et al.*,
v. *Appellants*,
STATE OF SOUTH CAROLINA *et al.*,
Appellees.

On Appeal from the United States District Court for
the District of South Carolina, Columbia Division

JURISDICTIONAL STATEMENT FOR
THE NATIONAL EDUCATION ASSOCIATION,
THE SOUTH CAROLINA EDUCATION ASSOCIATION,
NATHANIEL BROWN, EUNICE DOE, WILLIE EDNEY,
ROBERTA F. HILL, ANITA P. HUNTER,
DAVID LAWRENCE, EDWARD PINCKNEY,
AND ADOLPH SIMMONS

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
*Attorneys for the National
Education Association*

CRAIG K. DAVIS
1501 Washington Street
Columbia, South Carolina 29201
*Attorney for the South Carolina
Education Association and the
Individual Appellants*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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Appellants, all of whom were granted leave to intervene in the district court, appeal from the judgment of the United States District Court of South Carolina, Columbia Division entered April 14, 1977, and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion and order of the district court (App. A, *infra*, pp. 1-44) are not yet reported.

JURISDICTION

This suit was initiated on September 15, 1975, by the United States under the "pattern or practice" provision of Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a), and the Fourteenth Amendment. The intervenors' complaint presented additional statutory grounds for relief, 42 U.S.C. §§ 1981, 1983 and 2000e-2.¹

The district court's jurisdiction over the Government's allegations rested on 20 U.S.C. § 1708, 28 U.S.C. § 1345, and 42 U.S.C. § 2000e-6(b). The complaint in intervention presented additional statutory grounds for the district court's jurisdiction, 28 U.S.C. §§ 1331(a), 1343, and 42 U.S.C. § 2000e-5(f)(3).

On September 24, 1975, the Chief Judge of the Fourth Circuit, pursuant to 28 U.S.C. § 2284, constituted a district court of three judges to hear and determine this case (Haynsworth, C.J., Russell, C.J., and Simons, D.J.). Designation of a three-judge court was required by 28 U.S.C. § 2281² because plaintiffs sought to enjoin the operation of Sections 59-5-60, 59-21-80, and 59-25-110 of the Code of Laws of South Carolina 1976 (App. B, *infra*, pp. 45-49) and the operation of regulations of the State Board of Education which have statewide application. Designation of the three-judge court was also required by

¹ The United States and the intervenors are collectively referred to herein as "plaintiffs."

² Congress repealed 28 U.S.C. § 2281 effective August 12, 1976. The repealer does not affect this action, for it provides that "this Act shall not apply to any action commenced on or before the date of enactment." 90 Stat. 1120.

Section 707(b) of Title VII, 42 U.S.C. § 2000e-6(b), because then Attorney General Edward H. Levi certified that "this case involves matters of general public importance" and requested that a court of three judges be convened.

The three-judge court determined to dismiss the complaints herein and entered its judgment on April 14, 1977 (App. C, *infra*, pp. 50-51). The intervenors filed a timely notice of appeal to this Court on June 13, 1977 (App. D, *infra*, pp. 52-53).³

The jurisdiction of this Court to review the judgment of the court below is conferred by 28 U.S.C. § 1253 and 42 U.S.C. § 2000e-6(b). The following cases sustain the jurisdiction of this Court to review the judgment on direct appeal: *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) (suit to enjoin enforcement of State statute); *Sailors v. Board of Education*, 387 U.S. 105, 107 (1967) (same); *King v. Smith*, 392 U.S. 309, 312 n.13 (1968) (suit to enjoin enforcement of statewide regulations); *Dandridge v. Williams*, 397 U.S. 471, 473 (1970) (same); *Allen v. State Board of Elections*, 393 U.S. 544, 561-63 (1969) (appeal from a three-judge court convened pursuant to the Voting Rights Act of 1965).

QUESTIONS PRESENTED

(1) Whether South Carolina's standardized test score requirements for teacher certification, which were adopted at the time of conversion from dual to unitary status with knowledge that they would eliminate 40% of the black candidates but only 1% of the white candidates, and which were increased with knowledge that the higher scores would eliminate 83% of the black candidates, violate (a) the Fourteenth Amendment's prohibition against purposeful racial discrimination, or (b) Title VII of the Civil

³ The intervenors also filed a protective notice of appeal to the Fourth Circuit on June 13, 1977.

Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2; or (c) 42 U.S.C. § 1981.

(2) Whether the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, or 42 U.S.C. § 1981 bar the State of South Carolina and its local school districts from using scores on a standardized test as determinants of teacher pay levels where the test has not been validated for this use, the test developer disapproves of the use, and the score requirements adversely affect a significantly larger number and percentage of black teachers than white teachers.⁴

⁴ If probable jurisdiction is noted, appellants will urge that the district court erred in holding that the Eleventh Amendment bars (a) intervenors' claims against the State of South Carolina and three State agencies for backpay arising under the Fourteenth Amendment and 42 U.S.C. § 1981, and (b) intervenors' claims against State officials in their official capacities for backpay arising under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983. See *Milliken v. Bradley*, 45 U.S.L.W. 4873, 4880 n.23 (June 27, 1977); *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976). The district court's ruling that the Eleventh Amendment bars intervenors' backpay claims was unnecessary, premature, and without the aid of briefs. By Order No. 1, the district court bifurcated the issues in this case and set down for initial determination the question whether defendants' uses of the National Teacher Examinations violated federal law. All other factual and legal issues, including issues relating to the recovery of monetary relief, were reserved for later proceedings. Thus, the parties did not brief the Eleventh Amendment issues except insofar as defendants urged that the Eleventh Amendment ousted the court of subject matter jurisdiction over the State. Against this background, this Court may easily dispose of the district court's Eleventh Amendment rulings by vacating and remanding for appropriate evidentiary proceedings and briefing.

In addition, appellants will urge that the district court erred in failing to certify defendant classes consisting of local school districts in the State which (a) deny employment to persons unable to meet the NTE cutoff score requirements for certification and/or (b) rely on NTE scores to determine pay. This ruling is not independently worthy of review by this Court. If, however, this Court reverses the district court on the merits, resolution of the class action issue would substantially facilitate any further proceedings in the district court conducted for the purpose of fashioning remedies.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Fourteenth Amendment to the Constitution of the United States; Section 703(a) and (b) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) and (b); Section 1979 of the Revised Statutes of the United States, 42 U.S.C. § 1983; Section 1977 of the Revised Statutes of the United States, 42 U.S.C. § 1981; Sections 59-5-60, 59-19-90, 59-21-20, 59-21-80, 59-25-20 and 59-25-110 of the Code of Laws of South Carolina 1976 are set forth, *infra*, App. B, pp. 45-49.

STATEMENT

This appeal calls into question statutes and regulations governing the certification and pay of teachers in the State of South Carolina. Under South Carolina law, a person must hold a teaching certificate issued by the State Board of Education in order to be employed as a teacher in the public schools within the State (S.C. Code §§ 59-19-90(2), 59-25-20, App. B, pp. 47, 49). Since July 1, 1945, the State Board has required candidates for certification to take the National Teacher Examinations⁵ ("NTE") and has used NTE scores to determine the grade or type of teaching certificate, if any, that may be awarded to a candidate (PF 10).⁶ In addition, the State

⁵ The NTE are composed of two batteries of tests. The Common Examinations include tests in professional education and general education. The Teaching Area Examinations ("TAE") are tests in the subject matter that a prospective teacher expects to teach. Art teachers take the TAE in Art Education; French teachers take the TAE in French, and so on (App. A., p. 10 n.7).

⁶ Reference is to paragraph 10 of Plaintiff and Plaintiff-Intervenors' Proposed Findings of Fact and Conclusions of Law. Since the record will not be filed in this Court at the time the Court reviews this statement and appellees' responding papers, we have not employed the lengthy code used by the district court clerk to

Legislature has annually enacted into law "state-aid" salary schedules for teachers. These salary schedules allocate state-aid pay on the basis of the grade of a teacher's certificate, years of experience, and educational background (S.C. Code §§ 59-21-20, 59-21-80, App. B, 47-48). Similarly, the local school districts in South Carolina provide a "local supplement," which generally is allocated on the basis of the grade of a teacher's certificate and other factors (PF 12). Retirement benefits for teachers are based on earnings, and thus fluctuate according to the teacher's NTE pay bracket (PF 8). At all times since 1945, South Carolina's NTE score requirements have had a highly disproportionate adverse impact on black teachers and black candidates for certification as compared to whites (see pp. 7-12, *infra*).

Plaintiffs alleged that defendants' adopted and continue to enforce cutoff score requirements on the NTE for the purpose and with the effect of

- (a) paying less state aid, local supplements and retirement benefits to black teachers than to similarly situated white teachers, and
- (b) barring a significantly greater number and percentage of black teachers than similarly situated

designate each exhibit in the record. Any paragraph cited in Plaintiff and Plaintiff-Intervenors' Proposed Findings of Fact and Conclusions of Law contains the appropriate citations to the record using the code designated by the district court clerk.

⁷ Defendants, now appellees, are the State of South Carolina, the South Carolina State Board of Education, the South Carolina State Retirement System, the South Carolina Budget and Control Board, the Board of Trustees of the Charleston County School District, the Colleton County Board of School Trustees and the Board of School Commissioners of School District No. 1 of Richland County. In addition, the members of the various defendant boards and the executive secretary and director of the Retirement System are defendant-appellees herein.

white teachers from teaching opportunities in the public schools within the State.

Plaintiffs prayed for an order enjoining these uses of NTE cutoff scores and awarding backpay and other monetary relief to persons adversely affected by defendants' NTE score requirements.

A. The Adoption And Enforcement Of NTE Cutoff Score Requirements For Pay And Certification.

In 1940, the Fourth Circuit held that the "separate but equal" doctrine barred public officials from paying white teachers more than similarly situated black teachers on account of race. *Alston v. School Board of City of Norfolk*, 112 F.2d 992, 995-96, *cert. denied*, 311 U.S. 693 (1940). Notwithstanding *Alston*, the South Carolina Legislature for the next five years annually appropriated teachers' salaries according to dual pay schedules based explicitly on race (PF 20, 24).

In 1944, a study committee recommended and the State Board of Education approved a plan whereby (a) four grades of certificates would be distributed among candidates as follows—A-25%, B-50%, C-15%, and D-10%; (b) candidates' scores on the NTE Common Examinations would serve as the basis for effecting this distribution of certificates; and (c) pay levels would be based on the grade of certificate held by the teacher, years of service and educational background (PF 31, 36; J. Daniel, *Excellent Teachers* (1944), p. 281). Prior to the effective date of this plan, July 1, 1945, the State Board gave the NTE Common Examinations a trial run by administering it to approximately 50% of the in-service teachers in the State (PF 38). The trial run showed that the proposed distribution of A, B, C and D certificates would have the following racial impact on in-service teachers (PF 39):

Percentage Of In-Service Teachers
By Race Falling Within Each Proposed
Letter Grade Of Certificate

	Percent Of White Teachers	Percent Of Black Teachers
A	32)90	2)27
B	58	25
C	9)10	36)73
D	1	37

During the period of "massive resistance" to school desegregation,⁸ the State Board determined, effective July 1,

⁸ In 1955 and 1956, the State Legislature enacted, *inter alia*, the following measures: No. 339, Section 2 (voiding teacher contracts if schools are closed as a consequence of court order) 1955 Acts and Joint Resolutions of South Carolina, p. 660; No. 295, Section 1 (repealing laws providing for teacher reemployment), *id.* at 589; No. 57, Section 1 (repealing school attendance laws), *id.* at 85; No. 55, Section 3 (granting school trustees the power to transfer any child), *id.* at 84; No. 56, Section 1 (repealing laws governing the length of school term), *id.* at 85; No. 741 (unlawful for school districts to employ members of NAACP), 1956 Acts and Joint Resolutions of South Carolina, pp. 1747-48; No. 712 (principals given power to transfer students if their enrollment threatens to disturb the peace), *id.* at 1715; No. 813 (\$25,000 appropriated for special segregation committee's work), *id.* at 1932; No. 914 (resolution protesting the Supreme Court's decisions in *Brown* and directing that the State take such measures as appropriate to protect their sovereignty), *id.* at 2172-76; No. 920 (resolution appointing committee to investigate activities of NAACP at S. C. State College), *id.* at 2182-83; No. 927 (resolution continuing committee to study and report in view of nullification by federal courts of state constitution requiring separate schools), *id.* at 2197-98.

The statute books make clear that the state-aid salary schedule and other appropriations did not long escape the notice of those bent on massive resistance. The legislative appropriations for fiscal year 1956-57 for state aid for teachers' salaries, supervision, overhead, maintenance and operation of the public schools and operation of school lunch programs were conditioned on the maintenance of "racially segregated schools only," while similar appropriations for fiscal year 1955-56 contained no similar limitation. Compare Section 20 of No. 813 at 1869 and Section 20 of No. 234 at 356, Acts and Joint Resolutions of South Carolina of 1956 and 1955, respectively.

1957, to enforce new cutoff score requirements and abandon the practice of adjusting score requirements so as to maintain a constant percentage distribution of A, B, C and D certificates among its teachers (PF 48). The State Board knew from score data before it that the revised NTE cutoff scores would place more than 96% of the white candidates in the higher A and B pay brackets and would reduce the percentage of black candidates in the A or B brackets from 75.9 % to 41.1% (PF 69).⁹ The State Board intensified the disparate racial impact of these score changes by providing further that, effective July 1, 1957, C and D certificate holders—a group consisting mostly of black teachers—would be barred from receiving pay increments for graduate work (PF 70). These score requirements and pay policies continue today to determine the certification and pay status of teachers certified between July 1, 1957, and July 1, 1969.

"From 1957 through 1969, . . . the State continued to maintain its essentially dual school system through a variety of administrative measures" (App. A, p. 14). When decisions of this Court in *Bradley v. Richmond*, 382 U.S. 103 (1965), and *Green v. County School Board*, 391 U.S. 430 (1968), made clear that the end of the dual system of public education was in sight,¹⁰ the State, effective July 1, 1969, began using the NTE in a fashion that would exclude approximately 40% of the black can-

⁹ The score data before the Board consisted of test scores achieved by South Carolina candidates in 1956, and a chart predicting that under the proposed score changes candidates were likely to fall in the graded categories as follows: blacks—12% A, 29% B, 33% C, 20% D, and 5.5% denied certification; whites—78% A, 18% B, 3% C and 0.5% D. No whites would be denied certification. (PF 68).

¹⁰ For a report on the status of non-compliance between 1966 and 1969 with HEW regulations and court decrees requiring school desegregation in South Carolina, see *Whittenberg v. Greenville County School District*, 298 F. Supp. 784, 794 (D.S.C. 1969) (*en banc*).

didates. On this date, the Board ceased issuing letter grade certificates to candidates graduating after June 1969 and began issuing either the "professional" certificate or "warrant." For the professional certificate, candidates were required to attain a score of 450 or more on the Common Examinations, 450 or more on a TAE and a composite score of 975 or more.¹¹ For the warrant, candidates were required to attain a score of 400 or more on the Common, 400 or more on a TAE, and a composite score of 850 or more. Candidates scoring below 850 were not certified. (PF 52, 56.) The evidence shows that on the basis of the new cutoff score requirements, certificates would be distributed among black and white candidates taking the NTE in 1969-70 approximately as follows:¹²

	Percentage Of Blacks	Percentage Of Whites
Professional Certificate	31	97
Warrant	29	2
No Credential	40	1
	<hr/> 100	<hr/> 100

This was the first use of the NTE by the State to exclude an appreciable number of candidates.¹³ Virtually

¹¹ A composite score is the sum of a candidate's scores on the Common Examination and an appropriate TAE.

¹² See United States Fifth Request for Admissions, Attachment C, and response thereto.

¹³ Between July 1, 1957, and July 1, 1969, the Board denied D certificates to persons scoring below 332 on the Common. This score requirement was so low, however, that it had almost no exclusionary impact. Thus, in 1964, the South Carolina Director of Teacher Education described the State's use of the NTE as one where the examination "is not used to qualify an individual for a certificate. It is used only to place a grade on the certificate after the person has qualified for the certificate" through a teacher training program. (U.S. Third Request for Admissions, Attach. A, p. 5, and response thereto). In 1967-68, 15 of the 519 black candidates taking the NTE failed to meet the minimum score required for the D certificate (PF 79).

all of those excluded were black. As in the past, the pay of teachers certified on or after July 1, 1969, has been and is pegged in part to the teacher's certification status. Thus, warrant holders are barred from receiving "step" increases after the fifth year of service, whereas persons holding professional certificates are eligible for such annual increases up to and including the fourteenth year of service (App. B, p. 48). In addition, warrant holders are barred from receiving state-aid increments for graduate work, whereas holders of professional certificates are eligible for such increments (*id.*; PF 57). Many local districts supplement the state-aid pay levels but limit the amounts paid to warrant holders, and some districts deny them employment altogether (App. A, pp. 4-5; PF 83).

After the record closed in this case, the State Board of Education adopted higher composite NTE cutoff score requirements in 17 of 18 teaching areas.¹⁴ The court was informed of this modification of the State's NTE uses in papers submitted under a "certificate of counsel." This submission advised that defendants set the new score requirements after they reviewed the results of a validation study, considered the supply of and demand for teachers in South Carolina and ascertained the racial impact of the proposed new cutoff scores. In the latter regard, the score data relied on by defendants showed that the new score requirements would bar 83% of the black candidates and 17.5% of the white candidates for certification.¹⁵ The data further showed that the pool of newly

¹⁴ The district court's opinion lists the new cutoff scores for these teaching areas (App. A, p. 36). In the other, less customary teaching areas, candidates for certification are required to attain a score of 510 on the Common Examinations (*id.*)

¹⁵ See Appendix A to Plaintiff and Plaintiff-Intervenors' Joint Brief of August 4, 1976, and sources cited in note 1 thereof. The data are broken down according to certification areas and show, for example, that the State may reasonably expect to certify blacks at a rate of almost 17 per year in elementary education, almost

certified candidates would be approximately 96% white and 4% black. In contrast, the racial composition of the teaching force (i.e., employed teachers) in South Carolina in 1975-76 was 70.1% white and 29.3% black (App. A, p. 10).

B. Evidence Relating To The Validity Of Using NTE Scores As Pay Determinants.

Commencing at least as early as March 1970, the Educational Testing Service ("ETS"), the developer of the NTE, began advising defendants that their reliance on NTE scores to establish pay levels was a misuse of the test (PF 84-85). In 1973, for example, the director of the NTE program at ETS advised members of one state-appointed study committee that "the assigning of salary on the basis of [NTE] test scores is indefensible and should be discontinued immediately" (PF 90). In June of that year, the responsible ETS vice president advised the State Superintendent of Education that ETS would cease reporting NTE scores to the State if the State continued to base teacher pay on those scores,¹⁶ and the same vice president testified below that ETS adheres to the view that reliance on test scores to determine pay levels is a misuse of the test (PF 93; Manning Dep., pp. 804-05).¹⁷

As early as 1972, the State's then Director of Teacher Certification advised the Deputy State Superintendent

three per year in mathematics, almost two per year in music, four per year in physical education, almost eight per year in social studies, almost one per year in art. *Id.*

¹⁶ ETS ceased reporting scores to South Carolina between November 17, 1975, and December 13, 1975 (PF 95).

¹⁷ Reference is to the deposition of Dr. Winton H. Manning, Vice President of the Educational Testing Service, who was designated by ETS to give testimony in this case on behalf of the corporation pursuant to Rule 30(b)(6), of the Federal Rules of Civil Procedure (Manning Dep., p. 8).

that there was no need to appoint committees to study the State's use of the NTE. Instead, the Director of Certification recommended that the State Board should promptly promulgate regulations upgrading all outstanding B, C, and D certificates¹⁸ (PF 100). Notwithstanding this advice, the State referred the matter to numerous study committees between 1972 and 1976—at least four of which recommended that the State cease using the NTE to determine pay levels (PF 113). Commencing in July 1973, the State Board recommended abandonment of the NTE pay levels (PF 105). The State Legislature, however, continued annually to enact pay schedules that rely on NTE scores (App. B, p. 48).

There is no evidence in the record establishing that the State's use of NTE scores as pay determinants has been validated. The State's current Director of Teacher Certification testified that "[n]o one in the State Department of Education has conducted a study of the validity of the National Teacher Examinations" (PF 115). ETS's representative testified that ETS has not at any time endeavored to validate the NTE as an instrument for determining pay, that the NTE was not designed for this use or purpose, and that the pay use is a misuse of the test (PF 97, 116).

C. Evidence Relating To The Validity Of Using NTE Scores For Initial Entry Certification.

After the United States had completed its investigation of South Carolina's uses of the NTE and suit appeared to be imminent, ETS and the State decided to prepare a validation study to be used to defend the use of NTE cut-off scores as requirements for certification (PF 134-38).

The study agreed upon by ETS and the State elicited the opinions of 456 educators teaching in South Carolina

¹⁸ Holders of grade A certificates are paid the same as "professional" certificate holders. Thus, grade A certificate holders do not need to be upgraded (App. B, p. 48).

colleges and universities, who were given copies of the questions and answers for various parts of the NTE (PF 141; App. A, p. 34). The educators were broken into panels of about 10 participants, such panels being created according to the subject matter tested in the Commons and each of the TAE's (App. A, p. 34). Roughly half of these panelists were asked questions regarding the extent to which there is an overlap between the NTE and the curricula at their teacher training institutions.¹⁹ The other half of the panelists were asked to read each question and answer and to form an opinion as to:

What percentage of a "hypothetical group of persons" who have "the minimum amount of academic knowledge to complete the teacher education program required for certification in South Carolina," and have "the minimum amount of knowledge to teach effectively" and have chosen teaching careers rather than non-teaching careers or graduate study, will know the answer to the individual question (ETS Study, Appendix G-3).

The opinions generated by these questions were recorded, tabulated and analyzed by ETS in its "Report on a Study of the Use of the National Teacher Examinations by the State of South Carolina." The report concluded that between 63% and 98% of the items on the various tests in the NTE battery are appropriate for use in South

¹⁹ These educators were asked (1) whether the test's emphasis is more than, less than, or the same as the emphasis given to the subject in the curriculum "at your institution"; (2) whether the relationship between the general content topics of the test and the teacher training curriculum at your institution (a) is very closely related, (b) has "some differences," (c) has "some appreciable differences," or (d) has "little similarity"; (3) whether "any major content area" covered "in your institution" is "not included in the test content topics"; and (4) with respect to each of the items on the examination reviewed by you, "whether 90 percent of the students would have had an opportunity to learn the answer" (PF 144; App. A, pp. 34-35).

Carolina (App. A, p. 35). The study also projected the minimum score for each test—i.e., the score that would be attained by candidates who are "minimally qualified to graduate" from South Carolina institutions and are "minimally qualified" to teach.

The report acknowledged that "the cornerstone of the study is human judgment," i.e., the judgments of individual panel members who reviewed the tests in the NTE battery (PF 145). The study is also based on the premises that the participating educators are representative of the professors who teach teacher candidates, and are knowledgeable as to students' exposure to items tested and the minimum amount of knowledge necessary to graduate and to teach effectively (PF 148). Plaintiffs established, however, that ETS had collected, but failed to report, data showing whether the panel members had actually taught the material called for by the NTE questions which they reviewed. These unreported data were collected from 217 panel members whose task was to determine whether minimally qualified students would know the answer to the individual test items that they were asked to review. The data show that on the average these educators taught only 39.6% of the items on the tests that they reviewed (PF 181, 182; Appendix B to Plaintiffs' Joint Reply To the Brief Amicus Curiae for ETS).

The State, with ETS assistance, adduced expert testimony in support of the study and plaintiffs adduced expert testimony critical of the study. One expert, Dr. Robert L. Thorndike, Professor of Psychology and Education at Teachers College, Columbia University, was called by both sides and was characterized by ETS as an "acknowledged dean of the testing and measurement profession" (ETS Brief Amicus, p. 64). Dr. Thorndike was supportive of the study and its results insofar as the panel members were asked to compare the test with the curriculum, but he did not have before him the data show-

ing that on the average the panel members sampled by ETS had not taught 60% of the questions on the examinations they reviewed. Dr. Thorndike repudiated the methodology and results involved in projecting cutoff scores for persons minimally qualified to graduate and to teach effectively, stating that it was a "high level exercise in abstraction" that could not reasonably be expected of the educators (PF 163). Dr. Thorndike pointed out in this connection that the cutoff scores generated from the opinions of the educators would, according to statistics in the report, bar "about half" (47%) of the 4,604 college seniors in the State who took the NTE from November 1973 through July 1975 (Thorndike Written Statement, p. 11; ETS Study Report, p. 179). Dr. Thorndike concluded that "[g]rade point average is a weak basis for defining 'minimal competence,' but it seems as reasonable as the unanalyzed impressions upon which the judges were operating" (Thorndike Written Statement, p. 12).

The United States also offered its survey of the personnel files of teachers employed in the three defendant school districts. This survey showed that 548 of these in-service teachers had not attained the minimum score that, according to the study, would divide the minimally qualified from the unqualified, but the school districts had rated their on-the-job performances satisfactory or better (see Appendix C to Plaintiffs' Joint Reply To The Brief Amicus Curiae for ETS).

D. Opinion Of The District Court.

1. Ancillary Rulings.

Before turning to the merits, the district court tested the intervenors' claims for relief against the Eleventh Amendment. The court ruled that the Eleventh Amendment bars intervenors' claims against the State and three agencies of the State for injunctive relief and backpay

arising under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, but does not bar injunctive relief against officials of the three State agencies (App. A, pp. 6-8 & nn. 5, 6). The court also ruled that the intervenors' claims for relief against the local school districts were not barred by the Eleventh Amendment since they are not alter egos of the State (*id.* at 7 n.5). Additionally, the court held that all of the intervenors' claims arising under Title VII survived the Eleventh Amendment (*id.* at 28).

The court denied plaintiffs' joint motion to certify a defendant class of all local school boards within the State. It concluded that the motion to certify was timely, but that appellants failed to establish (a) that there are questions of law or fact common to the class, and (b) that the three school districts named as defendants have typical defenses and will fairly represent the class (*id.* at 4-5).

2. Rulings on the Requirement of NTE Scores as a Precondition to Certification of Teachers.

Turning to the merits of plaintiffs' Fourteenth Amendment claims, the court concluded that it could find no discriminatory intent surrounding the State's 1945 decision to tie the grades of its teaching certificates to NTE scores or the 1956 decision to shift from relative to absolute NTE score requirements. The court noted that steps leading to the 1969 decision to increase the minimum score necessary for initial entry certification coincided with stepped-up efforts by federal agencies and courts to bring about desegregation of the public schools of South Carolina, that the committee responsible for proposing the change would have been able to predict the racial impact of the new cutoff scores, and that this committee had before it two documents—one critical of the NTE as a predictor of student teaching performance and the other setting out "the ETS position that the test scores should

not be used as a sole criterion for certification." (*Id.* at 14-15). Nevertheless, the court concluded that the 1969 change was not racially motivated (*id.* at 15).

As to the 1976 score changes, the court held "that these regulations are properly before it since plaintiffs were undoubtedly aware that the validity study by ETS upon which these regulations were based was well underway when the suits were filed" (*id.* at 3).²⁰ The court said that "there are no statistics in the record indicating the impact of the new score requirements because they will be applied first to the class of 1977" (*id.* at 12)—thus ignoring data offered by the State showing that 83% of the blacks who took the NTE from November 1973 through July 1975 would have failed to meet the 1976 cutoff score requirements (*supra*, p. 11). It also said that plaintiffs offered "no proof of intentional discrimination beyond the proof offered" in connection with prior score changes; rather their "elaborate web of historical circumstances, from which the court is being asked to infer discriminatory purpose, is noticeably silent about recent events" (*id.* at 16). The court concluded that "there is no indication whatsoever that the State and its officers were motivated by anything more than a desire to use an accepted and racially neutral standardized test" (*id.* at 17). In result, the court ruled that defendants' uses of NTE cutoff scores as requirements for certification did not violate the Fourteenth Amendment's prohibition against purposeful discrimination (*id.*).²¹

²⁰ The validity study was not well underway at this time. The Government's complaint was filed September 15, 1975. Two days later, the state superintendent wrote to college presidents in the State as a preliminary step toward making a study. On October 1, 1975, ETS and the State Department of Education entered into a contract to perform the study (PF 136-38).

²¹ The court also ruled that the State's score uses meet the "rational relationship" standard of the Equal Protection Clause (App. A, pp. 23-27).

The district court also rejected plaintiffs' claims for relief arising under Title VII. As we read the court's opinion, it concluded that in the wake of *Washington v. Davis*, 426 U.S. 229 (1976), Title VII requires test users to show two "rational bases" for the test usage. First, the user must show that the test differentiated "between persons who did and did not have minimal verbal and communication skill" (App. A, p. 33). Second, the user must show "that the minimum verbal and communication skill, in turn, [has] some rational relationship to the legitimate employment objectives of the employer" (*id.*).

After describing ETS's study, the court said "the design of the validity study is adequate for Title VII purposes" (*id.* at 36) and concluded that "the results of the validity study are sufficiently trustworthy to sustain defendants' burden under Title VII" (*id.* at 38). The court touched briefly on the results of the United States' random selection and deposition of 81 of the 456 panel members. These depositions elicited testimony as to whether the panelists understood ETS' instructions and performed the tasks assigned in accordance with the study design (see PF 153, 155-56). The court said that the depositions show "some misunderstanding did exist" but "our review of these depositions shows that the misunderstandings were much less extensive than claimed by plaintiffs" (*id.* at 37-38). Moreover, according to the court, since defendants made a "reasonable showing" that the study was executed in a "professional manner designed to produce trustworthy results . . . plaintiffs must not only show that the study was not executed as intended, but also that the results were adversely affected" (*id.* at 38-39).

The court rejected plaintiffs' contention that there is no "business necessity" that justifies defendants' use of NTE cutoff scores for certification. The court said that we cannot find that "mere graduation from an approved

program"—i.e., a teacher training program monitored and approved by the State—"will achieve the State's purpose in certifying minimally competent persons equally well as the use of a content-validated standardized test" (*id.* at 42). The court said that the State's own standards and procedures for approving teacher training programs were deficient because they did not focus on the actual content of courses and student mastery of such content, and because of that deficiency the use of test scores "survives the business necessity test under Title VII" (*id.* at 42).

3. *Rulings on the Use of NTE Scores To Fix the Pay Levels of Teachers.*

In testing the pay uses against the Fourteenth Amendment, the court declared that the State's dual pay system and its delay in implementing a "unitary" pay system for five years after the Fourth Circuit declared dual pay systems unconstitutional "provide some support" for an inference of purposeful discrimination (*id.* at 21). The court, however, found the inference to be rebutted by the fact that when the State began using NTE scores to fix pay levels, it also provided for other pay increments on the basis of concededly nondiscriminatory criteria—years of experience and educational background (*id.* at 21).

The court passed over the pay changes during the State's "massive resistance," and next considered the 1969 score changes. According to the court, plaintiffs relied on the fact that the 1969 changes "provided fewer benefits and incentives" to warrant holders—who were predominantly black—and that the developer of the test, ETS, "was later opposed to their use for this purpose" (*id.* at 22-23). The court rejected an inference of discrimination from these facts because it found an "equally persuasive explanation"—"an intent to obtain the maximum incentive for improvement that could be accomplished with a fixed number of dollars" (*id.* at 23).

In reviewing plaintiffs' contention that defendants' use of the NTE as a pay determinant violated Title VII, the court ruled that, in light of the adverse racial impact of the test, defendants had the burden to show "a rational relationship" between the pay use and a "legitimate employment objective" and to show "business necessity" (*id.* at 43). The court concluded that the pay use met both of these standards since "[t]here appears to be no alternative available to the State, within reasonable limits of risk and cost, for providing the incentive necessary to motivate thousands of persons to acquire, generally on their own time and at their own expense, the necessary additional academic training so that they will be minimally competent teachers" (*id.* at 43). In holding that defendants' pay uses satisfy Title VII, the court did not mention the absence of any attempt to validate this test usage nor did it discuss the relevance of its earlier finding that ETS objected on "psychometric grounds to this test usage" (*id.* at 22 n. 12).

THE QUESTIONS ARE SUBSTANTIAL

The lower court's decision warrants plenary review. The State of South Carolina has established, and the district court has approved, a certification plan that will entrust school teaching in South Carolina almost exclusively to the white race. Black teachers represented 42% of the teachers employed in South Carolina in 1953-54; 34.4% of those employed in 1966-67, and 29.3% of those employed in 1975-76 (*id.* at 10). The pool of newly certified candidates available for employment will be approximately 96% and 4% black (*supra*, pp. 11-12).

The significance of the decision below extends well beyond South Carolina. In North Carolina, an injunction previously entered against similar uses of the NTE by the State has been vacated and North Carolina has been afforded an opportunity to offer in evidence an ETS va-

lidity study struck from the same mold as the one for South Carolina.²² In Mississippi, the State Board of Education in 1975 established NTE cutoff score requirements for certification. The racial impact of Mississippi's score requirements is not known to appellants, but, in litigation involving a local Mississippi school district's use of the NTE, it was established that in 1970 an NTE composite cutoff score of 1000 would eliminate 89% of the students graduating from predominantly black institutions in that State as against 10% of the students graduating from predominantly white institutions there. *Baker v. Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

Moreover, local school districts have resorted to NTE cutoff score requirements for employment and reemployment of teachers when their systems were faced with imminent desegregation. To date, the courts have enjoined these uses of the NTE. *Baker v. Columbus Municipal School District*, *supra*; *Walston v. County School Board*, 492 F.2d 919 (4th Cir. 1974); *United States v. Chesterfield County School Dist.*, 484 F.2d 70 (4th Cir. 1973); *Pickens v. Okolona Municipal Separate School District*, 3 Race Relations Law Survey 180 (N.D. Miss. Aug. 11, 1970). There can be little doubt that if the decision of the lower court is permitted to stand, many more school officials will turn to the NTE, thereby further hastening the disappearance of black educators in the South.

Against this background, the importance of the decision below is apparent. As we shall now demonstrate, it also conflicts with decisions of this Court and with other lower courts and is otherwise erroneous, so that review by the Court plainly is warranted. Moreover, the rulings involve broad issues, the significance of which extends beyond the

²² See *United States v. North Carolina*, 400 F. Supp. 343 (E.D. N.C. 1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977).

uses of NTE cutoff scores, thus emphasizing the importance of the decision below and of review by this Court.

A. In Determining Whether The Certification Requirements Were Purposefully Discriminatory, The Court Below Failed To Apply Controlling Principles Enunciated By This Court and Applied By The Fourth And Fifth Circuits In Striking Down NTE Cutoff Score Requirements Imposed Coincident With School Desegregation.

The decision below ignores *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 209-10 (1973), and conflicts with decisions of the Fourth and Fifth Circuits, which, applying the rule approved in *Keyes*, have struck down local system uses of the NTE. *Walston v. County School Board*, 492 F.2d 919, 924 (4th Cir. 1974); *Baker v. Columbus Municipal Separate School District*, 462 F.2d 1112, 1115 (5th Cir. 1972), *affirming*, 329 F. Supp. 706 (N.D. Miss. 1971).

In *Keyes*, this Court embraced the principle that "in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189, 192 (CA 4 1966) (*en banc*)."
Keyes, *supra*, 413 U.S. at 209. The Court said that in meeting such a burden "it is not enough that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative [or discriminatory] intent was not among the factors that motivated their actions." *Id.* at 210. The Court further observed that its burden-shifting principle is not new. "In the context of racial segregation in public education, the courts, including this Court, have recognized

a variety of situations in which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated." *Id.* at 209.

The Fourth and Fifth Circuits have applied the same principle in holding that where, coincident with desegregation, local school officials adopt and enforce NTE cutoff score requirements which bar significantly higher percentages of black candidates than white candidates from employment and reemployment, a presumption of purposeful discrimination arises and the burden of proof shifts to defendants. *Baker, supra*; *Walston, supra*. Cf. *United States v. Chesterfield County School District*, 484 F.2d 70 (4th Cir. 1973).

The elements necessary to trigger the *Keyes* burden-shifting principles are present in this case. First, the district court found that "[f]rom 1957 through 1969, . . . the State continued to maintain its essentially dual school system through a variety of administrative measures" (App. A, p. 14; see also *id.* at 13-14). Second, in 1969, coincident with the necessity of eliminating the dual system of schools, the State changed its use of the NTE so as to exclude for the first time an appreciable number of candidates for certification. Third, the excluded class consisted of "a disproportionately large number of Negro teachers," *Keyes, supra*, 413 U.S. at 209—approximately 40% of the black candidates as compared to 1% of the whites.

The district court's failure to mention, much less follow *Keyes*, *Walston* and *Baker* not only undermines its ruling exonerating the 1969 NTE certification policy under the Fourteenth Amendment but also its approval of the post-record score changes made in 1976. If the district court

had concluded, as *Keyes* required, that a rebuttable inference arose that the NTE cutoff scores adopted and enforced prior to the closing of the record were based on racial animus, then the court could not properly have upheld the post-record score changes on the ground that plaintiffs failed to offer direct evidence of purposeful discrimination. If the Board fashioned an NTE certification policy in 1969 for the purpose of discriminating against black candidates, it was under a duty to eradicate the effects of its racially discriminatory certification policy. See *Green v. County School Board*, 391 U.S. 430 (1968). It was not at liberty to build upon that policy by instituting even higher cutoff scores having an even greater racial impact.²³

B. The District Court Failed To Apply The Proper Title VII Standards Respecting Job Relatedness And Business Necessity.

The district court held that defendants' uses of the NTE would not violate Title VII if defendants showed a "rational relationship" between the test and a "legitimate employment objective" (*supra*, pp. 19, 21). This standard deviates from the job relatedness requirements of Title VII. In *Washington v. Davis, supra*, this Court said that where a test bars a disproportionately greater percentage of blacks, under Title VII—

"it is an insufficient response to demonstrate some *rational basis* for the challenged practices. It is nec-

²³ Both the Fourteenth Amendment and Title VII bar the use of tests or procedures that are neutral in terms of intent if they operate to "freeze" the status quo of prior discriminatory employment practices. *Teamsters v. United States*, 45 U.S.L.W. 4506, 4512 (May 31, 1977), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *Louisiana v. United States*, 380 U.S. 145, 154-56 (1965); *Gaston County v. United States*, 395 U.S. 285, 296-97 (1969).

essary, in addition, that they [the employment practices] be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." 426 U.S. at 274; emphasis added.²⁴

The district court's failure to apply the proper Title VII standard of job relatedness constitutes an error warranting reversal.

The district court also reduced the concept of "business necessity" to a matter of administrative convenience. As we show below, the facts simply do not permit the conclusion that there is a "business necessity" for using the NTE to determine the pay of teachers and to exclude candidates for certification unless the word "necessity" is emptied of its meaning.

1. *Pay.* The record establishes that neither the defendants nor the test developer, ETS, has validated the NTE as a determinant of the pay of in-service teachers (*supra*, p. 13). Indeed, ETS has publicly and privately warned defendants that the pay use is a misuse of the test; and ETS's designated representative testified in this case that the validation study conducted in support of the State's certification use does not justify the State's pay

²⁴ Guidelines published by EEOC and standards published by the American Psychological Association also require substantially more than a "rational relationship" between a test and the job. EEOC, Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607; American Psychological Association, *Standards for Educational & Psychological Tests* (1974); American Psychological Association—Division 14, *Principles for the Validation and Use of Personnel Selection Procedures* (1975). These documents are part of the evidence in the record.

use²⁵ (Manning Dep., pp. 804-807; Maynard Exhibit, N. 71, pp. 1-2).²⁶

In upholding the defendants' pay use, the district court has erroneously sustained an unvalidated test use that is condemned by the test developer. It accomplished this result by applying a rational relationship standard even though Title VII requires validation. See *Washington v. Davis*, quoted *supra*, pp. 25-26.

In lieu of requiring validation, the district court accepted the theory that conditioning teacher pay on NTE scores offered an "incentive for improvement, so that teachers without adequate knowledge to teach effectively will upgrade their capability . . ." (App. A, p. 43). Evidently the court believed that B, C, and D teachers (1) could upgrade their knowledge only by securing additional training and (2) would make a commensurate improvement in their NTE scores reflecting such training (*id.* at 43, 24, 27). The evidence on the other hand shows that the NTE is not designed to measure the learning increments of veteran teachers, whether gained by training or experience, and that the test is not a tool for assessing whether an in-service teacher has the minimum knowledge to perform his or her duties effectively.

The NTE are designed for college seniors—not for veteran teachers (Manning Dep., pp. 47-48). Test scores

²⁵ Tests that are valid for making one type of decision or inference about persons are not perforce valid for other types of decisions or inferences about persons. Thus, the American Psychological Association warns that "[i]t is incorrect to use the unqualified phrase 'the validity of the test.' No test is valid for all purposes or in all situations or for all groups of individuals. Any study of test validity is pertinent to only a few of the possible uses of or inferences from the test scores." APA, *Standards for Educational & Psychological Tests* (1974) p. 31 (emphasis by APA).

²⁶ Maynard Exhibit, N. 71 is a discussion paper prepared by ETS for a meeting with South Carolina officials on August 12, 1975.

made while a college senior do not predict the value or effectiveness of the teacher after several years on the job; scores made by a veteran teacher on an examination designed to measure the achievement of college seniors on today's curriculum do not measure the veteran's classroom performance. Thus, in April 1972, ETS advised the State that the NTE's estimate of a candidate's "potential" teaching abilities "becomes truly 'academic' at the point where school district officials can answer the more basic question of how well an experienced teacher is using his knowledge in the classroom *If a teacher is performing well he clearly has adequate knowledge* To permit these [NTE-based certificate] grades (and accompanying pay differentials) to exist after records of each teacher's performance have been accumulated attaches a weight to the NTE which we feel is unreasonable." (Letter from Dr. Manning to State Superintendent Busbee, PF 89; emphasis added).²⁷ To fix pay brackets on the basis of NTE scores "ascribes an exactitude of measurement to NTE scores which ETS feels is unjustified" (*id.*).

The district court's decision to uphold this unvalidated use of the test, notwithstanding the admonitions of the test developer, moreover, conflicts with holdings of the Fourth Circuit and a three-judge District Court for the Northern District of Georgia. In *Walston v. County*

²⁷ The ETS Guidelines for Using the National Teacher Examinations (1974) state that "[u]sing the NTE in determining a teacher's retention, tenure, or salary level is a misuse of the examinations. If an adequate and reliable record of a teacher's in-service performance is available, there is no need to measure his or her preparation for teaching. The critical criterion in evaluating an in-service teacher is not potential but actual teaching performance. The NTE are not an adequate measure of teaching performance—nor is any other single process or instrument." (Manning Exhibit 13, p. 10.)

School Board, supra, 492 F.2d at 927, the Fourth Circuit ruled that the NTE "cannot be used without proper validation studies and job analyses" and cannot be "administered capriciously in derogation of the guidelines promulgated by the ETS." In *Georgia Association of Educators v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976), a three-judge court held that Georgia's use of NTE cutoff scores to establish pay levels for in-service teachers was patently irrational.

The district court's pay ruling is all the more worthy of plenary review by this Court because it guts the concept of business necessity. The record shows that after 1970 at least four committees advising the State Board and then the State Board itself in 1973 recommended against the pay use (*supra*, p. 13). In light of these facts, the district court's holding that the unvalidated pay use "survives" the business necessity standard of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is unsupportable.

2. *Certification.* The district court's unwarrantedly narrow view of Title VII's job-relatedness requirements also led it to conclude erroneously that the ETS validity study was sufficient to sustain the certification use under Title VII. Thus, the court accepted the study although it was based on subjective and unmanageably vague criteria contrary to *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); the court failed to measure defendants' justification for their certification use against the "manifest" relationship standard of *Griggs v. Duke Power Co.*, *supra*; and it found a business necessity for the use in the face of a record compelling the opposite conclusion.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court rejected a validation study that was based on "subjective supervisorial rankings," *id.* at 432. The Court observed that "Albemarle's supervisors were asked to rank

employees by a 'standard' that was extremely vague and fatally open to divergent interpretation," and that "there is no way of knowing precisely what criteria of job performance" were being considered or "whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind." The Court held that Albemarle's validation study did not "justify a testing system with a racially discriminatory impact." *Id.* at 433.

The deficiencies that led this Court to reject Albemarle's validation study are to be found as well in the ETS study. For example, in attempting to validate NTE cutoff scores, the panel members were asked to conjure up a "hypothetical" group of persons. The persons in the imaginary group were to fulfill not one, but two criteria—they were to be (a) minimally qualified to teach effectively and (b) minimally qualified to complete a teacher training program (*supra*, p. 14). Pursuant to the ETS design, the panel members were then to perform further mental gymnastics: each was to determine what percentage of his imaginary group would know the answer to each item on the NTE (*supra*, p. 14). As Dr. Thorndike testified, this was a "high level exercise in abstraction" (*supra*, p. 15).

Moreover, the evidence shows that the results generated by the ETS study are neither trustworthy nor consistent with facts from the real world. Thus, ETS collected, but did not disclose in its report, data showing that on the average the panel members from South Carolina training schools had not taught approximately 60% of the items about which they were asked to give an opinion. Moreover, when viewing the test questions and answers in the abstract and imagining a hypothetical group of South Carolina students who are minimally qualified to graduate, the instructors set score levels that were beyond the capability of 47 percent of the South Carolina seniors

whom these educators and their peers had trained and given grades permitting them to attain that rank. And the cutoff scores generated by the ETS study exceeded the scores attained by 548 experienced teachers employed in the three defendant school districts whose job performance was rated satisfactory or better. *Supra*, p. 16.

The fact that the district court found the validity study sufficient is explained, in our view, by its erroneous conclusion that Title VII requires test users to show no more than a "rational relationship" between the test and a legitimate employment objective. This Court said that Title VII requires test users to show a "manifest" or "demonstrable" relationship to successful job performance. *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 432; *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 801 (1973). Lower federal courts have generally interpreted *Griggs* to require a fit between the test and the job that is tighter than a mere showing of a "rational relationship." *Walston v. County School Board*, *supra*, 492 F.2d at 924 (*Griggs* standard is more stringent than "reasonably necessary connection"); *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) (relying on *Griggs* to establish that employer cannot "rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job"); *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973) (*Griggs* puts a "heavy burden" on employer to show a "demonstrable relationship" between the test and the job); *United States v. Georgia Power Co.*, 474 F.2d 906, 912 (5th Cir. 1973) (test must "reliably predict" which applicants have the reasonably necessary skills); *Officers for Justice v. Civil Service Commission*, 371 F. Supp. 1328, 1335-36 (N.D. Cal. 1973) (viewing *Griggs* standard as more stringent than "rational basis" standard). The validity study at bar should have been but was not subjected to a standard

more stringent than the lower court's rational relationship standard.²⁸ See *Washington v. Davis*, quoted at pp. 25-26, *supra*.

The district court must have applied a similarly lenient standard in holding that defendants' use of the NTE to screen out candidates for certification survived the "business necessity" test (App. A, pp. 40-42). The court devoted only two paragraphs of its opinion to this subject. One paragraph sets forth the court's view that "business necessity" is not the same as a "compelling interest" (*id.* at 41). The other paragraph states that while the State monitors and approves teacher training programs offered by the institutions within South Carolina, the State's approval relates "to general subject matter areas covered by the program, not to the actual course content of the program, and not to the means used within the program to measure whether individual students have actually mastered the course content to which they have been exposed" (*id.* at 42). In light of this purported deficiency in the State's approval program, the court reasoned that there is a "business necessity" for using the NTE because "standardized test scores do reflect individual achievement" (*id.* at 42).

The evidence shows that the State operates nine institutions of higher education that train teachers and it prescribes standards for and monitors each of the public and private teacher training institutions in the State. The standards the State uses to monitor and approve teacher

²⁸ The loose standard of scrutiny applied by the court below is particularly inappropriate in the case at bar where the study was conducted by the test developer and the State for the purpose of providing a defense in this lawsuit (PF 134). In *Moody*, the Court cautioned that courts must examine with "great care" any validation study prepared by interested parties during litigation. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 n.32 (1975). See also *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) ("... post hoc rationalization ... must be viewed critically").

training programs have been developed by the National Association of State Directors of Teacher Education and Certification ("NASDTEC")²⁹ and are relied upon by at least 31 States which, like all the States except for Mississippi and South and North Carolina, do not require NTE scores as a precondition to initial entry certification (PF 264, 268). If, as the State contended in this litigation, its standards for monitoring and approving teacher training programs need to focus more on the "actual content" of courses and student mastery of the content, then the State may direct its efforts toward sharpening its monitoring and approval program. In the meantime, it may rely on grade point average, for as Dr. Thorndike, the only expert called by both sides, testified: grade point average is "as reasonable" a basis for defining minimal competence as the NTE cutoff scores generated by the "unanalyzed impressions upon which the [panel] judges were operating" (*supra*, p. 16). When 47 of the 50 States use neither the NTE nor any other standardized test for initial entry certification, South Carolina's self-serving claims of deficiency do not make out a case of business necessity for waiting until the students have satisfactorily completed a State-approved teacher training program and then barring approximately 83% of the black candidates.

²⁹ The term "State Director of Teacher Education and Certification" generally refers to the State official in charge of teacher training. NASDTEC is the national professional association for these State officials.

CONCLUSION

The three-judge district court was properly convened pursuant to 28 U.S.C. § 2281 and Section 707(b) of Title VII, 42 U.S.C. § 2000e-6(b), and the judgment of that court is reviewable in this Court on direct appeal pursuant to 28 U.S.C. § 1253 and Section 707(b) of Title VII. For the reasons stated above, the district court's judgment presents substantial questions of federal law that were erroneously determined below in conflict with the rulings of this Court and of other federal courts and to the detriment of black persons throughout the United States. Accordingly, this Court should note probable jurisdiction and set this case down for plenary review.

Respectfully submitted,

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
*Attorneys for the National
Education Association*

CRAIG K. DAVIS
1501 Washington Street
Columbia, South Carolina 29201
*Attorney for the South Carolina
Education Association and the
Individual Appellants*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Appendices

APPENDIX A

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 75-1610

[Filed April 14, 1977, Miller C. Foster, Jr., Clerk]

UNITED STATES OF AMERICA,
Plaintiff,

—and—

SOUTH CAROLINA EDUCATIONAL ASSOCIATION, THE NA-
TIONAL EDUCATIONAL ASSOCIATION OF THE UNITED
STATES, NATHANIEL BROWN, EUNICE DOE, WILLIE
EDNEY, ROBERTA F. HILL, ANITA P. HUNTER, DAVID
LAWRENCE, EDWARD PINCKNEY, ADOLPH SIMMONS,
Plaintiff-Intervenors,

—versus—

STATE OF SOUTH CAROLINA, SOUTH CAROLINA STATE
BOARD OF EDUCATION, SOUTH CAROLINA STATE RE-
TIREMENT SYSTEM, SOUTH CAROLINA BUDGET AND CON-
TROL BOARD, CHARLESTON COUNTY BOARD OF EDUCA-
TION, COLLETON COUNTY BOARD OF EDUCATION, RICH-
LAND DISTRICT No. 1 BOARD OF EDUCATION, ON BEHALF
OF THEMSELVES AND ALL OTHER BOARDS OF EDUCATION
OF SIMILIARLY SITUATED PUBLIC SCHOOL DISTRICTS,
Defendants.

ORDER

This is a decision in a bifurcated trial before a three-
judge court. Pursuant to a prior Order of the court, only

issues of constitutional and federal law with respect to liability were considered at the first three-judge hearing. Procedural issues with respect to the alleged plaintiff class and all issues with respect to the availability or amount of damages were reserved for later determination.¹

The United States brought this action on September 15, 1975, against the State of South Carolina, the South Carolina State Board of Education, the South Carolina State Retirement System, the South Carolina Budget and Control Board, and three local school boards in their individual capacities and as representatives of a defendant class of all local school boards in the State. The defendants are charged with violations of the Fourteenth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.*, (1970), through the use of minimum score requirements on the National Teacher Examinations (hereinafter "NTE") to certify and determine the pay levels of teachers within the State.

On September 17, 1975, the South Carolina Education Association (SCEA), the National Education Association (NEA), and nine named individuals as class plaintiffs brought another suit against the same defendants in their official and individual capacities, seeking substantially the same relief sought by the U.S. Attorney General's suit, basing their actions also upon the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, as amended; and, in addition, alleging violations of Sections 1981 and 1983 of Title 42 of the United States Code.

These plaintiffs moved to intervene in the Attorney General's action. This motion was granted on January

¹ In view of the court's conclusions as hereinafter set forth this is a final Order that effectively disposes of all issues in this litigation, and no further proceedings or hearings are necessary.

6, 1976, and they became the plaintiff-intervenors, and their separate action was stayed.

For over thirty years the State of South Carolina and its agencies have used scores on the NTE to make decisions with respect to the certification of teachers and the amount of state aid payable to local school districts. Local school boards within the State use scores on the NTE for selection and compensation of teachers. From 1969 to 1976, a minimum score of 975 was required by the State for its certification and state aid decisions. In June, 1976, after an exhaustive validation study by Educational Testing Service (ETS), and, after a critical review and evaluation of this study by the Board of Education's Committee on Teacher Recruitment, Training and Compensation and the Department Staff, the State established new certification requirements involving different minimum scores in various areas of teaching specialization that range from 940 to 1198. The court holds that these regulations are properly before it since the plaintiffs² were undoubtedly aware that the validity study by ETS upon which these regulations were based was well under way when the suits were filed.

The local boards are required by the State to hire only certified teachers, S.C. Code §§ 21-45, 21-371, 21-375 [now §§ 59-5-60, 59-25-110, 59-25-160 to 270 of the 1976 Code], but there are no uniform standards with respect to test scores used by the local school boards in selecting from among the pool of certified applicants.

Plaintiffs challenge each of the uses of the NTE. They contend that more blacks than whites historically have failed to achieve the required minimum score, and that this result creates a racial classification in violation of the constitutional and statutory provisions cited in their complaints. Each complaint seeks declaratory and in-

² When used in the plural, "plaintiffs" includes the plaintiff and the plaintiff-intervenors.

junctive relief with respect to the use of the minimum score requirement in certifying and determining the pay levels of teachers, injunctive relief to upgrade the certification levels of teachers adversely affected by the minimum score requirement, and monetary relief for alleged financial losses of teachers, together with costs. Plaintiff-intervenors also asked for attorneys' fees.

Preliminary matters: There are three preliminary matters pending before this court which should be decided at the outset. By the court's order of June 17, 1976, rulings on the objections of all parties to the admissibility of certain evidence, and the determination of whether to certify the defendant class were reserved to the three-judge panel. At oral argument before the three-judge panel, plaintiffs moved for a review of the court's prior order permitting the defendants to conduct redirect examination of one witness by written questions.

Admissibility of evidence: We have considered all of the evidence offered by the parties and the objections thereto. In view of the fact that the court itself is the finder of fact, we admit and consider all of the evidence offered by all parties, and base our findings on the weight and probative value to be accorded the evidence in light of objections made by counsel.

Certification of the defendant class: Plaintiffs sought to bring their actions against a defendant class of all local school boards within the State, and by timely motion sought to certify the class under Rule 23, Federal Rules of Civil Procedure. The motion to certify is denied. The defendant class sought by plaintiffs does not meet the requirements of the Rule since they have failed to establish that there are questions of law or fact common to the class. Each of the 92 school districts involved apparently has different policies with respect to the hiring, salary and tenure of teachers. It appears that some districts hire only teachers with professional cer-

tificate plus additional credentials; some hire on the basis of professional certificates alone; others are willing to consider warrant holders. Some districts provide a local salary supplement for nearly all positions; while others provide such supplements for a few classes of positions or none at all. Further, the plaintiffs have made no proper showing that the three school districts named as class representatives have defenses that are typical of the class, and that they will fairly and adequately protect the interests of the class. Thus another requirement of the Rule has not been met by plaintiffs. It is therefore concluded that plaintiffs have failed to carry their necessary burden to establish that their action falls within any of the provisions of Rule 23 in order to justify the court's certifying it as a class action as sought by them.

Review of the Order permitting examination by written questions: Plaintiffs asked the three-judge panel to review and overturn the order entered by the district judge (acting for the three-judge panel in all preliminary and prehearing matters) granting a motion by the State defendants to make certain written questions propounded during discovery and the answers thereto a part of the record.

This dispute arose during the deposition of Dr. Winton H. Manning, a Vice President of ETS which administers the NTE. The plaintiffs deposed Dr. Manning for several days resulting in nearly 2000 pages of transcript. ETS being concerned with plaintiffs' inability to conclude the deposition of this senior officer offered to answer questions in lieu of continuing the deposition by oral questioning.³ Plaintiffs agreed and submitted 188 written questions on cross-examination. ETS answered these

³ Because ETS is not a party, it could not be subjected to discovery through written interrogatories except by its consent. Rule 33, Federal Rules of Civil Procedure.

questions promptly. Thereafter, Dr. Manning submitted to another day of oral cross-examination. Defendants then submitted 174 written questions in lieu of redirect examination by oral questions. ETS answered those questions. Plaintiffs then submitted 54 written questions in lieu of oral re-cross examination which ETS answered.

Plaintiffs objected to the admission into evidence of the answers to the questions on redirect examination. They urge that the procedure is not permitted by the Federal Rules, or authorized by any agreement of the parties. We hold that the agreement of the parties did not give plaintiffs the exclusive right to use written questions in this regard, and such agreed to procedure is not inconsistent with the Federal Rules, and did not adversely affect the plaintiffs. It would be unfair to deny the defendants the same opportunity to use written questions as was afforded to plaintiffs. Plaintiffs' motion is therefore denied.

I. CONSTITUTIONAL ISSUES

We first consider whether the use by the State and its Board of Education of a minimum score requirement on the NTE violates the equal protection clause of the Fourteenth Amendment.⁴

We conclude as a preliminary matter that the plaintiff-intervenors' causes of action under the Fourteenth Amendment against the State and the three State agencies

⁴ The United States appears to base its complaint exclusively on the equal protection clause of the Fourteenth Amendment. Plaintiff-intervenors expressly base their complaint on both the due process and equal protection clauses, but do not specify their due process grounds. To the extent that plaintiff-intervenors invoke the substantive guarantees of the due process clause, the standard applied is the same as under the equal protection clause, and we treat them on the same basis.

are barred by the Eleventh Amendment.⁵ The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970), does not explicitly authorize suits against states and therefore cannot be used to circumvent the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974). The claims for monetary and injunctive relief under the Fourteenth Amendment are barred because a state is not divested of its immunity "on the mere ground that the case is one arising under the Constitution or laws of the United States." *Parden v. Terminal R. Co.*, 377 U.S. 184, 186 (1964), quoting *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). The state agencies, by the nature of their responsibilities, function as an arm or "alter ego" of the State and are, therefore, protected by the State's immunity. *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971).

We also dismiss the plaintiff-intervenors' causes of action under Sections 1981 and 1983 against all defendants except the members and officers of the institutional defendants.⁶ States are immune from suit by virtue of

⁵ The comparable cause of action brought by the United States is unaffected by the Eleventh Amendment. *United States v. California*, 297 U.S. 175 (1936); *United States v. Texas*, 143 U.S. 621, 642-43 (1892).

The plaintiff-intervenors' causes of action for injunctive relief against the officials of the three state agencies are not barred by the Eleventh Amendment. When the State's officers act illegally, they act "without the authority" of the State and thus outside the shield of sovereign immunity. *Ex parte Young*, 209 U.S. 123 (1908).

The plaintiff-intervenors' claims for relief against the local school boards are not barred by the Eleventh Amendment because the relative autonomy of these boards puts them outside the category of agencies that are "alter-egos" of the State. *Burt v. Board of Trustees*, 521 F.2d 1201 (4th Cir. 1975); *Adams v. Richland School District #1*, 412 F.Supp. 647 (D.S.C. 1976).

⁶ The plaintiff-intervenors named as defendants the members of the State Board of Education, the executive secretary and director of the State Retirement System, the members of the Budget and Control Board, and the members of the three local school boards,

the Eleventh Amendment on the basis of 42 U.S.C. § 1983. *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), cert. den. 420 U.S. 964 (1975); *Percy v. Brennan*, 384 F.Supp. 800, 809 (S.D.N.Y. 1974); *Francis v. Davidson*, 340 F.Supp. 351, 370 (D.Md. 1972), aff'd. 409 U.S. 904 (1972). None of these defendants are "persons" within the meaning of Section 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Fitspatrick v. Bitzer*, — U.S. —, 96 S.Ct. 2666 (1976); *Monroe v. Pape*, 365 U.S. 167 (1961). Similarly, none of these defendants are subject to suit under Section 1981. *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972); *Black Brothers Combined v. City of Richmond*, 386 F.Supp. 147 (E.D. Va. 1974); *Bennett v. Gravelle*, 323 F.Supp. 203, 216-17 (D.Md.), aff'd. 451 F.2d 1011 (4th Cir. 1971), cert. dismissed 407 U.S. 917 (1972).

In disposing of the remaining constitutional claims, separate consideration must be given to the State's use of the test scores to certify teachers and to determine the amount of state aid for local school districts. Plaintiffs allege that the disparate racial impact of defendants' certification and compensation systems creates a racial classification in violation of the Fourteenth Amendment. In order to sustain that allegation, the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), requires plaintiffs to prove that the State intended to create and use a racial classification. If plain-

all in their official capacities only. Prospective injunctive relief against state agency officers is not precluded by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974). Insofar as the plaintiff-intervenors seek damages from state agency officers in their official capacities, the Eleventh Amendment requires dismissal because the agencies with which they are affiliated are "alter egos" of the State and the State's funds are at stake. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Thonen v. Jenkins*, 517 F.2d 3, 6 (4th Cir. 1975); *Francis v. Davidson*, 340 F.Supp. 351 (D.Md.), aff'd. 409 U.S. 904 (1972); *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971).

tiffs fail to prove intent (or defendants adequately rebut that proof), then we must evaluate this classification under the rational relationship standard required by the Fourteenth Amendment as to all such classifications.

A. Discriminatory Intent

Because of its paramount importance under *Washington v. Davis*, we look first at whether the plaintiffs have proved that any of the challenged decisions of defendants were motivated by an intent to discriminate. The purpose or intent that we must assess is the purpose or intent that underlies the particular act or acts under review. In its decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977), the Supreme Court suggested that evidence as to several factors might have probative value in proving intent: historical background, the sequence of events leading up to the challenged decision (including substantive and procedural departures from the norm), legislative history, and testimony from officials. 45 U.S.L.W. at 4077-78. With these factors in mind, we look separately at the defendants' actions with respect to the use of the NTE for certification purposes and those relating to its use for state aid purposes.

1. Certification

South Carolina requires persons who teach in the public schools to hold a certificate issued by the State Board of Education. S.C. Code § 21-354. From 1945 to the present the State has had four certification systems, each requiring prospective teachers to take the NTE. Candidates are able to take the NTE an unlimited number of times. (The tests are given by the State three or four times each year).

The record before us indicates that during this period, the racial composition of the South Carolina teacher force has closely paralleled the racial composition of the State's population. The 1950 census estimated that 61.1% of the population was white and 38.8% was black. In 1953-54, the State employed a teacher force that was 58% white and 42% black. The 1960 census showed a population that was 65.1% white and 34.9% black. In 1966-67, the teacher force was 65.6% white and 34.4% black. The 1970 census showed a population that was 69.5% white and 30.5% black. In 1975-76, the teacher force was 70.1% white and 29.3% black.

From 1945 through 1968, the State issued four grades of certificates: A, B, C and D. From 1945 through 1956, candidates were awarded certificates based on their relative standing with respect to test scores of all candidates in the State for the year: A certificates went to the top 25%; B certificates to the middle 50%; C certificates to the next 15%; and D certificates to the bottom 10%. Under this system, every candidate who met the other requirements was licensed.

In 1957, a new system of absolute, rather than relative, requirements was instituted. Under this system, a score of 500 or more on the Common Examinations portion of the NTE⁷ was required for an A certificate; a score of 425 to 499 for a B certificate; a score of 375 to 424 for a C certificate; and a score of 332 to 374

⁷ The National Teacher Examinations are composed of two batteries of tests. The Common Examinations include tests in professional education (psychological and social foundations of education, and generally applicable methods and principles of teaching) and general education (English, social studies, literature, fine arts, science and mathematics). The Area Examinations are tests in the subject matter that a prospective teacher expects to teach. Art teachers take the Area Examination in Art Education; French teachers the Area Examination in French, and so on.

There was no minimum score requirement on the Area Examination portion of the NTE at this time.

for a D certificate. Those with scores below 332 were not licensed. During the academic year 1967-68, that restriction eliminated less than 1% of the candidates from predominantly white colleges and approximately 3% of the candidates from predominantly black colleges. The reason for these low percentages is that the 332 minimum score, when placed on the NTE score scale of 300 to 900 points, is very near the lowest attainable score.

In 1969, the certification system was further revised by replacing the four-tiered system with two types of certificates: the professional certificate and the warrant. The minimum score requirement was set at 975 for the professional certificate, including a score of at least 450 on the Common Examinations and at least 450 on the applicable Area Examination; and 850 for the warrant, including a score of at least 400 on the Common Examinations and 400 on the applicable Area Examination. Those who attained scores below 400 were not licensed. In the academic year 1969-70, the maximum score requirement of 400 on the Common Examinations eliminated approximately 41% of the graduates of predominantly black colleges and less than 1% of the graduates of predominantly white colleges. Similar results were obtained in succeeding years, despite the fact that a score of 400 is unusually below the 11th percentile nationally, and almost 90% of the candidates who take these tests get a higher score.

In 1976, the certification system was again revised, the two-tiered system being replaced with a single certificate with separate minimum score requirements in each of the 18 fields of teaching specialty replacing the single minimum score requirement. These combined scores on both Common Examinations and Area Examinations ranged from 940 in Agriculture to 1178 in Library and Media Specialties; and are set forth in detail herein-

after. There are no statistics in the record indicating the impact of the new score requirements because they will be applied first to the class of 1977; however, plaintiffs predict that, under these requirements, the disparate impact may be even greater.

Plaintiffs have asserted four acts by the State indicating discriminatory intent: (1) The decision in 1945 to institute an NTE requirement; (2) The decision in 1956, effective in 1957, to institute an absolute rather than relative score requirement; (3) The decision in 1969 to revise the absolute score requirement to include the Area Examinations as well as the Common Examinations and raising the previous required scores; and (4) the decision in 1976 to change the single composite score requirement to separate composite score requirements for each teaching field, and in all but one case raising the required scores again. We conclude for the following reasons that such actions by the State were not motivated by an intent to discriminate because of race.

The 1945 decision: In 1941, a committee was appointed by the General Assembly to review the certification and compensation of teachers. The committee recommended that a thorough study of the certification system be made and suggested that the use of an NTE score requirement be explored because of the great variation in teacher training institutions. The State Board undertook a two-year study that resulted in a four-volume report, made available in 1944. That report recommended four different teacher credentials based on relative NTE scores. On the basis of the report, the State Board adopted the four-tiered system described above under which no candidate was denied licensing. At that time, South Carolina maintained a dual public school system with segregated student bodies and faculties. After the decision to institute the new certification

system, but before its effective date, the State Board tested 50% of the teachers in the State, which revealed that 90% of the white teachers, and only 27% of the black teachers, would qualify for A or B certificates (the two top grades). The remaining candidates—10% of the whites and 73% of the blacks—would receive C and D certificates. After receiving these data, the State Board did not rescind its decision to institute the new certification system.

We are unable to find any discriminatory intent from these facts. Although the historical background of segregated schools might provide some basis for the inference urged by plaintiffs, any such inference has been rebutted. The committee based its recommendation concerning the NTE in part on its conclusion that the tests "can be scored objectively and impartially and their use would not be subject to the accusation that they are used for purposes of discrimination."⁸ The Board's extensive study is viewed as an earnest effort in its time, and provided reasonable support for its decision to institute an NTE requirement. The Board's knowledge of differential impact, without more, does not support a finding of discriminatory intent.

The 1956 decision: From 1945 through 1956, the State Board received from ETS statistical summaries of the test scores of South Carolina candidates showing that blacks as a group had lower average scores than whites as a group. In 1954 and 1955, the Supreme Court handed down its historic decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), which announced the end of the "separate but equal" rationale for segregated school systems. South Carolina did not thereafter integrate its schools, but instead adopted policies which maintained its dual school sys-

⁸ Report of the Special Committee to Investigate Statutory Laws Dealing with Education, p. 9 (1941).

tem until well into the 1960's. In 1956, the School Board adopted the absolute score system without a professional study relating the scores to effective teaching or academic achievement in the teacher preparation program.

Again, we find nothing in the record to support a finding of discriminatory intent. Plaintiffs have not persuaded the court that the State's reluctance to integrate its schools infected its decisions on teacher certification. The minimum score requirement of 332 was so low as to preclude us from presuming or even inferring that this was the case. Only 3% of the candidates from black colleges (and 1% of the candidates from white colleges) were denied certificates under this system during the last year it was in effect; and its effect in earlier years was not substantially different. The State Board did not move to change the system when it discovered that very few blacks were excluded, and significantly, this system was maintained for over 11 years.

The 1969 decision: From 1957 through 1969, the State Board continued to receive from ETS statistical data indicating disparate impact by race. During this period, the State continued to maintain its essentially dual school system through a variety of administrative measures.⁹ In 1968, the State Board received a report from a committee formed in 1967 to study the certification system. The committee included black and white members who were educators, teachers, state administrators and others. The committee had before it, *inter alia*, two documents, one which was critical of the NTE as a predictor of performance in student teaching, and the other which

⁹ In 1966, the federal government began to take action to cut off federal funds because of lack of integration in the school system. In 1968, the Supreme Court held in *Green v. County School Board*, 391 U.S. 430 (1968), that the "freedom of choice" system was unconstitutional indicating that unitary school systems could no longer be avoided.

set out the ETS position that the test scores should not be used as a sole criterion for certification if other measures were available. The committee reviewed the academic programs and admission requirements at the State's 25 teacher training institutions and determined that not all had the same resources and strengths. The committee recommended that the minimum score levels be raised to 975 for professional certificates and 850 for warrants. From the data supplied by ETS, the committee would have been able to predict the impact of its recommendations on black teacher candidates as a group and on white candidates as a group (although it is unclear that such a prediction was ever made). The State Board adopted the committee's recommendations.

We are unable to find any intent to discriminate with respect to this decision. Plaintiffs offer no direct evidence of such an intent, even though one obvious source, the black members of the committee, was apparently available to them. The State's authority to re-define minimal competence from time to time cannot reasonably be questioned.

The 1976 decision: ETS urged that the State validate its cut-off score adopted in 1969. In 1971, ETS issued Guidelines that made its position clear. In the absence of any affirmative response by the State, in 1974 ETS announced its intention to cease the reporting of scores to South Carolina. In 1975, a three-judge court issued an interim decision in the case styled *United States v. North Carolina*, 400 F.Supp. 343 (E.D.N.C. 1975), vacated 425 F.Supp. 789 (E.D.N.C. 1977) which required objective proof by the State of a rational relationship between the minimum score requirement on the NTE and the State's objective of certifying only minimally competent teachers. Shortly thereafter, the State Board authorized an extensive validity study which was conducted by ETS over a period of three months. The re-

sults of the study are set out in a two-volume, 300-page report, which was delivered to the State Board in January, 1976. The Board adopted the study report's recommendation that there be separate minimum score requirements by teaching field, and set new higher score levels based on the data produced by the study.

The 1976 decision carries a separate importance inasmuch as a finding with respect to it is the only basis for injunctive relief. Intent with respect to prior decisions is relevant only to damages. Plaintiffs offer no additional proof with respect to the defendants' alleged intent to discriminate in establishing the new certification requirements in 1976. They apparently rely on the cumulative historical background and the imminence of litigation with regard to the prior system. Even if we had found intent to discriminate with respect to one of the State's earlier decisions, this cumulative history would be without probative value as to the 1976 decision.

While historical circumstances may illuminate the purpose of a particular State action, recent events are far more probative than distant events. With the exception of the 1969 adoption of minimum cutoff scores, the "history" relied on by plaintiffs occurred over 20 years ago. Plaintiffs' elaborate web of historical circumstances, from which the court is being asked to infer discriminatory purpose, is noticeably silent about recent events. Significantly, the cases relied on by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, and by plaintiffs in this case (for the proposition that historical circumstances do bear upon invidious purpose) involved events occurring within four years of the state act or decision under review.

With respect to the constitutional challenge to South Carolina's use of the NTE for certification purposes, we conclude that the plaintiffs have not demonstrated the required discriminatory intent with respect to any of the

specific decisions setting certification standards based on NTE scores. This is especially true in connection with the State's 1976 change in requirements where there is no indication whatsoever that the State and its officers were motivated by anything more than a desire to use an accepted and racially neutral standardized test to evaluate the teacher applicants competing for relatively few jobs in South Carolina.

The NTE are developed and administered by ETS, an independent non-profit organization of recognized professional reputation. ETS recommends that minimum score requirements not be used as a sole determinant of certification decisions where other appropriate information or criteria are available.

In this case, the plaintiffs have come forth with no other reasonably appropriate criteria upon which certification may be properly based.

Neither have plaintiffs been able to establish any defect in the NTE indicating that the examinations themselves discriminate on the basis of race. The choices as to subject matter and question format are reasonable and well-documented on the record, and although other subject matters or other examination forms might be possible or even preferable, there is no proof of any inherent discrimination. The inference that plaintiffs would have us draw from the statistics which indicate that blacks as a group have lower average scores than whites is rebutted by the evidence with respect to the construction of the tests and their content validity. Since we find that the NTE create classifications only on permissible bases (presence or absence of knowledge or skill and ability in applying knowledge), and that they are not used pursuant to any intent to discriminate, their use in making certification decisions by the State is proper and legal.

2. Pay Scales

Plaintiffs raise a separate constitutional challenge to South Carolina's use of the NTE as a partial determinant of the salaries paid to public school teachers. The use of the NTE for salary purposes is distinct from, and, in significant ways, unrelated to the use of the NTE for certification purposes. Accordingly, we must again examine plaintiffs' proof with respect to intent.

Public school teachers are hired and paid by local school boards in each of the 92 school districts within the State. Each year since 1942 the Legislature has provided state funds for use by the local school districts in paying teacher salaries. This state aid is provided in accordance with a schedule, enacted into law annually. The schedule is the formula by which the amount of state aid for each school district is calculated. In some districts, teachers are paid only the amount available through state aid. In most districts there is a local supplement. The formula for state aid with respect to each teacher's salary takes into account the number of years of college or post-graduate training, the number of years of teaching experience, and the type of teaching credential held (professional certificate, warrant, or A, B, C, or D graded certificate).¹⁰

Plaintiffs challenge the state-aid formula insofar as it uses as one criterion the type of teaching credential and thus, indirectly, NTE scores.¹¹ Plaintiffs claim that the

¹⁰ In 1969 and 1976, when the State changed the certification system, all those certified under the previous system maintained their then-current classification unless they met the more stringent qualifications for the new professional certificate. At present there are still numerous holders of graded certificates and warrants.

¹¹ Plaintiffs also challenge the formula for calculation of retirement benefits which are determined on the basis of salary earned during employment because salary is, in part, determined by the type of teaching credential held, and again the NTE scores are

formula creates a racial classification and was so intended by the State.

In this instance we have approximately 34 separate annual decisions by the Legislature to enact the state aid schedule and to appropriate funds pursuant to that schedule. However, there are two turning points with respect to our inquiry into intent: the decision in 1945 to relate eligibility for state aid to certification requirements and thereby incorporate NTE scores into salary decisions; and the decision in 1969 to retain as a basis for the state aid formula the four-tiered certification system with its built-in NTE score requirements. With respect to each of these decisions, we find as follows:

The 1945 decision: Before 1940, South Carolina had a dual pay system in which black teachers were paid less than white teachers; both having the same credentials and responsibilities. In 1940, a similar dual pay system maintained by the State of Virginia was held unconstitutional. *Alston v. School Board*, 112 F.2d 992 (4th Cir.), *cert. denied*, 311 U.S. 693 (1940). There was no consideration, in that case, of South Carolina's pay system, but the Court's view of the legality of any dual pay system was made clear. In 1941, a committee appointed by the General Assembly began to examine the salary system, and that work was carried on by the State Board which produced in 1944 a recommendation for a unitary system. The dual pay system thus survived until 1945 when the Legislature enacted a unitary system of state aid applicable to all teachers. That system was based in part on the certification grading system adopted by the Board of Education in that year.

At the time the Legislature acted, it had access to the results of the November, 1944, administration of the

involved. There is no different question of law or fact with respect to the retirement system and our decision on the salary issue controls.

NTE to about half of the teachers in the State. Those results indicated that 32% of the white candidates would be classified as *A* certificate holders while only 2% of the black candidates would be so classified. At the other end of the scale, 1% of the whites and 37% of the blacks would be classified as *D* certificate holders. In between, 67% of the whites and 61% of the blacks would be entitled to *B* and *C* certificates. This meant that although blacks and whites would have equal access to salary incentives for college and graduate work and salary rewards for longevity, the amount of those salary supplements would be affected by the grade of the certificate held, with the highest supplements available to the *A* certificate holders and the lowest supplements available to the *D* certificate holders.

The difference in supplements available to the holders of various grades of certificates was not uniform between each of the four tiers of the system. This differential was generally highest, in absolute terms, between *D* and *C* certificates, somewhat less between *C* and *B* certificates, and lowest between *B* and *A* certificates. Under this system, the Legislature provided to the holders of *D* certificates the greatest monetary incentive for improvement of the grade of the certificate. The other incentives to acquire additional education or rewards for longevity while holding the same certificate were to some extent independent of the incentives to improve the grade of the certificate.

Soon after this salary system was put into effect, it was challenged on Fourteenth Amendment grounds. The federal district court (Judge Waring) found that, although the prior dual pay system was arbitrary and could not be sustained, the new system had "eliminate[d] entirely any danger of disparity or discrimination by reason of race or color." *Thompson v. Gibbes*, 60 F. Supp. 872, 878 (E.D.S.C. 1945).

We are unable to find a discriminatory intent from these facts, even though the historical background of a dual pay system and a delay in implementing a unitary system after the Fourth Circuit struck down a similar system in another state provide some support for such an inference. Such inference is adequately rebutted by the evidence with respect to what the Legislature actually did. The unitary pay system was based in part on the amount of educational training and years of teaching experience possessed by each teacher. Plaintiffs make no claim that the use of either of these factors was motivated by discriminatory intent, and it is evident that the monetary rewards available through these avenues alone, without regard to the grade of certificate, were significant. The link between the new unitary pay system and the new certification system is not without a reasoned basis. It was important to the State to use its limited resources to improve the quality of the teacher force and to put whatever monetary incentives were available in the salary schedule to that task. As before stated, we have found that no discriminatory intent has been established with respect to the decision in 1945 to adopt a certification system based in part on NTE scores; and, therefore, without independent proof, there is no associated discriminatory intent in linking the certification and salary systems.

The only independent proof offered by plaintiffs is the availability of statistics provided by ETS showing differential performance by race and the presumption that the Legislature knew of this impact when it enacted the salary system. Statistics indicating differential impact are without independent constitutional significance, *Washington v. Davis*, 426 U.S. 229, 242 (1976), therefore knowledge of such statistics is similarly unpersuasive.

The 1969 decision: In July 1969, the State Board replaced the old *A-B-C-D* certificates (prospectively only)

with a professional certificate and a warrant. At the same time the Legislature retained the state-aid formula based on the *A-B-C-D* classification. Holders of professional certificates and warrants were paid at the rates applicable to holders of *A* certificates.¹² Some changes tinkering with the system had been made over the years and was reflected in the system retained in 1969.

From 1945 through 1969, statistical data was made available indicating that the percentage distribution of teachers among the four categories of teaching credentials was not uniform by race. Significant numbers of blacks qualified each year for *A* and *B* certificates, but a relatively higher percentage of blacks were in the *C* and *D* categories. Similarly, although it could be predicted that significant numbers of blacks would achieve professional certificates, a relatively higher percentage of blacks would hold warrants.

Plaintiffs urge that the Legislature was motivated by an intent to discriminate because the state aid schedule provided fewer benefits and incentives for two classifications of teachers in which there were relatively more blacks than whites; the classifications continued to be based, if only in part, on examination scores; and the developer of the tests was later opposed to their use for

¹² In 1969 the State ceased the practice of granting *B*, *C*, or *D* certificates. Since these teachers lack the knowledge to teach effectively according to the ETS study, they probably should not have been hired in the first place. We are informed by counsel for the State that only a small percentage of teachers hired prior to 1969 are paid by the grade of their certificate, and that these teachers are rapidly decreasing in number (for instance, at last report there were only 31 *D* certificates, distributed almost equally between blacks and whites, and 399 *C* certificates held almost entirely by blacks). While we do not think this practice is unconstitutional, and we understand that the ETS objection is based upon testing or psychometric considerations rather than legal ones, we do not think such a practice should be continued in the future. Unqualified teachers should no longer be hired, and certainly not retained. (Defendants' Proposed Findings of Fact and Conclusions of Law).

this purpose. In the absence of any competent or persuasive direct evidence of intent, plaintiffs would have us draw an inference from the facts that are available. But such an inference can stand only if there is no equally persuasive explanation consistent with a legitimate intent. Here the reordering of priorities with respect to the limited resources available for teacher salaries appears entirely consistent with an intent to obtain the maximum incentive for improvement that could be accomplished with a fixed number of dollars. We are unable to find an intent to discriminate.

B. Application of Rational Relationship Standard

In the absence of discriminatory intent, the classifications of teachers for both certification and pay purposes may be assessed under the "rational relationship" standard required by the Fourteenth Amendment of all classifications.

The Supreme Court has defined this standard in the following terms:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

We conclude that the State's use of the NTE for both certification and pay purposes meets the "rational relationship" standard of *McGowan v. Maryland*, *supra*, and consequently does not violate the equal protection clause of the Fourteenth Amendment. No more rigorous constitutional standard need be applied to a case which does not involve express differentiation by race or other "suspect" classification, and does not involve discriminatory intent. We find however, that were an intermediate standard applied, the defendants' use of the NTE bears a "fair and substantial relationship to the achievement of an important and constitutionally permissible governmental objective." (See *Woods v. Mills*, 528 F.2d 321 (4th Cir. 1975), and *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973).

Nevertheless, we find that the defendants have offered a legitimate and important governmental objective for their use of the NTE. The State has the right to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary to effective teaching. *Dent v. West Virginia*, 129 U.S. 114 (1889); *United States v. North Carolina*, 400 F.Supp. 343, 348-49 (E.D. N.C. 1975) (three-judge court), *vacated on other grounds*, 425 F.Supp. 789 (E.D.N.C. 1977). The evidence in the record supports a finding that South Carolina officials were concerned with improving the quality of public school teaching, certifying only those applicants possessed of the minimum knowledge necessary to teach effectively, utilizing an objective measure of applicants coming from widely disparate teacher training programs, and providing appropriate financial incentives for teachers to improve their academic qualifications and thereby their ability to teach. We conclude that these are entirely legitimate and clearly important governmental objectives.

In considering whether defendants' use of the NTE bears a fair and substantial relationship to these governmental objectives, we conclude that it does.

The record supports the conclusion that the NTE are professionally and carefully prepared to measure the critical mass of knowledge in academic subject matter. The NTE do not measure teaching skills, but do measure the content of the academic preparation of prospective teachers. *United States v. North Carolina*, 400 F.Supp. 343, 350 (E.D.N.C. 1975), *vacated on other grounds*, 425 F.Supp. 789, (E.D.N.C. 1977). Like the test at issue in *Washington v. Davis*, *supra*, the NTE program "is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue." 426 U.S. at 246. Plaintiffs have not contended nor proved that the NTE are racially biased or otherwise deficient when measured against the applicable professional and legal standards.

Furthermore, there is ample evidence in the record of the content validity of the NTE. The NTE have been demonstrated to provide a useful measure of the extent to which prospective teachers have mastered the content of their teacher training programs. In a similar challenge to a bar examination the Fourth Circuit has held that proof of such content validity is persuasive evidence that the equal protection clause has not been violated. *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976). The Supreme Court has held that a substantial relationship between a test and a training program—such as is found here—is sufficient to withstand challenge on constitutional grounds. *Washington v. Davis*, 426 U.S. at 248-52.¹³ State officials surely have the right to require

¹³ We therefore reject as irrelevant to the equal protection challenge plaintiffs' evidence directed at the relationship (or lack of it) between the NTE and the actual job of teaching. The statistical studies in the record do not prove that high NTE scores

graduation from approved teacher training programs as a prerequisite to being certified to teach in South Carolina. Plaintiffs have acknowledged the substantial relationship between the academic training program and the job of teaching by advocating that a requirement of graduation from an approved program *alone* is sufficient to protect the public interest.

Also, the minimum score of 975 selected by South Carolina in 1969, and the range of scores selected in 1976 were permissible exercises of judgment by the responsible officials. In fact the minimum scores adopted by the State in 1976 are for the most part substantially lower than those recommended for adoption by ETS. As in *Washington v. Davis*, "there is no evidence that the required passing grade was set at an arbitrarily high level." *Id.* at 254 (concurring opinion of Mr. Justice Stevens). The evidence supports the conclusion that the 975 score was selected in large part because it enabled the State to deny certification to only those who scored in the lowest 10% of all candidates taking the NTE throughout the United States; and that score reflected the judgment as to minimal competence of a committee of independent responsible professionals. Such exercise of judgment, although subjective and imperfect, may nonetheless serve to support a minimum test score requirement challenged on equal protection grounds. *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 96 S.Ct. 2660 (1976). Although we agree that a professionally designed and executed validity study is not necessarily required to demonstrate the relationship between a challenged use of a test and the governmental

would correlate with high scores on measures of teaching effectiveness. However, all the experts who testified in this case, including those offered by plaintiffs, agreed that there is, as yet, no satisfactory measure of teaching effectiveness. For that reason, evidence of a lack of correlation is unpersuasive.

objective for which it is being used, *Tyler v. Vickery*, *supra*, we find support for our conclusions with respect to the NTE in the validity study conducted in this case and discussed below in connection with our analysis of plaintiffs' contentions under Title VII.

We also conclude that defendants' use of the NTE for salary purposes bears the necessary relationship to South Carolina's objectives with respect to its public school teaching force.¹⁴ Although the NTE were not designed to evaluate experienced teachers, the State could reasonably conclude that the NTE provided a reliable and economical means for measuring one element of effective teaching—the degree of knowledge possessed by the teacher. Having so concluded, defendants could properly design a classification system relying on NTE scores for compensating teachers and providing incentives for teachers to improve their knowledge in the areas that they teach. The retention of this system for pay purposes after 1969, when the requirements for certification were changed, cannot be said to be arbitrary or completely without justification. The defendants were under no obligation to change all components of the program at the same time irrespective of the impact of such changes upon the State's financial situation and its continued interest in providing incentives for teachers with low NTE scores.

II. TITLE VII ISSUES

We turn now to the question whether defendants' uses of the NTE violate Title VII, 42 U.S.C. § 2000(e), *et seq.* (1970). Defendants raise four legal challenges to plaintiffs' Title VII claims which we must consider at

¹⁴ Surely children attending South Carolina's public schools are entitled to the best qualified available teachers, regardless of whether they are white or black, and the State has a solemn duty to accomplish this goal in keeping with its financial ability to do so.

the outset: (1) whether the Eleventh Amendment bars plaintiffs' claims; (2) whether defendants are employers within the coverage of Title VII; (3) whether Title VII applies to certification activities; and (4) whether the Attorney General has the authority to bring this "pattern or practice" action.

Neither the claims of the United States nor the plaintiff-intervenors under Title VII are barred by the Eleventh Amendment. In *Fitzpatrick v. Bitzer*, — U.S. —; 96 S.Ct. 2666 (1976), the Supreme Court held:

[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. (— U.S. —, at —, 96 S.Ct. at 2671).

Applying that test, the Court held that an action under Title VII cannot be dismissed on Eleventh Amendment grounds because Title VII was enacted pursuant to Section 5 of the Fourteenth Amendment.

The State and its three agencies assert that they are not "employers" of teachers within the meaning of Title VII because all public school teachers are hired, paid and discharged by local school boards. These defendants further assert that their activities are only "certification" of teachers and not "selection," therefore, they are not

within the coverage of Title VII. The factual record on these issues was not well-developed because the parties concentrated their efforts on the disparate impact statistics and the validity study. All parties concede that the local school boards are "employers" within the meaning of Title VII and that their activities include "selection" practices that are covered by Title VII. Even though we have declined to certify the defendant class that would have put at issue the practices of all 92 local school boards within the State, the three individual school board defendants are properly before us. The local school boards defend against plaintiffs' claims by asserting that their practices with respect to the NTE are governed for the most part by the State's regulations. Because of our decision as to liability, we find it unnecessary to determine whether the State and its three agencies are employers of teachers within the meaning of Title VII.

The defendants also assert that, after the 1972 amendments to Title VII, the Attorney General of the United States was without authority to bring this "pattern or practice" action against them. The 1972 Amendments broadened the scope of Title VII significantly by extending its coverage to state governments and governmental agencies, and augmented the powers of the Equal Employment Opportunity Commission (EEOC) by authorizing the Commission to bring civil actions where it is unable to obtain acceptable conciliation agreements from employers. Section 707 of Title VII was amended to transfer to the Commission the Attorney General's authority to initiate "pattern or practice" actions.

With regard to *private* employers, there can be no doubt that, since March 24, 1974, at which point the transfer of authority under Section 707 became complete, the Commission has had sole authority to bring "pattern or practice" actions, and that the Attorney General has

no such authority. The Attorney General has not claimed otherwise in this case. It is also clear from the language of Section 706(f)¹⁵ that *individual* complaints against *public* employers are to be brought to the Commission, or initiated by Commissioners, and that the Commission is to proceed with its "informal methods of conference, conciliation and persuasion."¹⁶ Only when such methods fail does authority shift to the Attorney General, who is then empowered to bring a civil action. The Attorney General has no authority to investigate such charges or to bring such actions on his own initiative, but can only step in to sue public employers with respect to *individual* complaints when a case is referred to him by the Commission following the procedures prescribed in Section 706.

Similarly, with the transfer to the Commission of the Attorney General's authority "to investigate and act on a charge of a pattern or practice of discrimination" in Section 707, 42 U.S.C. § 2000(e)-6 (1970), the Attorney General is stripped of any authority to initiate any "pattern or practice" litigation, as in the present case. But Section 707 need not be read to preclude prosecution of "pattern or practice" actions against public employers

¹⁵ Section 706(f) provides that if, after a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission,

the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent *not a government, governmental agency, or political subdivision named in the charge.* In the case of a respondent *which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent* in the appropriate United States district court. (42 U.S.C. § 2000(e)-5). *Emphasis added.*

¹⁶ Section 706(a).

nor to permit the Commission to bring such actions against public employers in the face of Congress' explicit rejection of such authority in cases involving individual complaints of discrimination. Section 707(e), after granting the Commission authority to investigate and act on "pattern or practice" charges, mandates that "[a]ll such actions shall be conducted in accordance with the procedures set forth in Section 706 [42 U.S.C. § 2000 (e)-5 (1970)] of this Act." Those procedures, as discussed above, require, *inter alia*, that the Commission investigate the validity of any charges, and attempt to reach a conciliation agreement with employers before bringing any court actions.¹⁷

The logical and consistent reading of Section 707 is that the Commission's "pattern or practice" authority is identical to its authority to act upon charges of individual discriminatory actions. It initiates investigations into charges of both types, seeks conciliation agreements, and, failing in those attempts, goes to court. And, in both types of actions, where the defendant is a public employer, the Commission cannot sue but, following unsuccessful attempts at a conciliation agreement, must refer the matter to the Attorney General. The Commission is thus assigned no greater authority to act against public employers in "pattern or practice" cases than it has in other actions under Section 706, yet public employers are not immunized against "pattern or practice" charges and litigation.

Section 707 does not preclude the Attorney General from bringing "pattern or practice" actions against public employers on referral from the Commission, and, in

¹⁷ Such conciliation efforts may have been particularly useful in this case where defendants were planning an extensive validity study using a new model. If the government's objections to the design, execution and data analysis of the State's study had been made known in a timely fashion through conciliation, this litigation might have been avoided.

fact, *requires* that such actions be brought, if at all, by the Attorney General. But the Act vests no authority in the Attorney General to initiate Title VII actions—"pattern or practice" or otherwise—against employers *except* upon referral from the Commission following the procedures of Section 706. In the present case, as in *United States v. Fresno Unified School Dist.*, 412 F. Supp. 392 (E.D. Cal. 1976),

the Commission has had no involvement with this case from its inception and . . . the Commission has not complied with the express requirements of Title 42, United States Code, Sections 2000(e)-6(e) and 2000(e)-5. The Attorney General has not contended otherwise. He has based his standing solely upon the contention that the Justice Department's former independent pattern or practice authority survived the 1972 Civil Rights Act Amendment. The Attorney General's argument is, however, without merit. He presently has no authority to act on his own initiative in a pattern or practice case. (*Id.* at 394).¹⁸

The claims of the United States under Title VII are dismissed.

The remaining claims under Title VII must be tested under statutory standards. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court summarized the order of proof:

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged prac-

¹⁸ We are advised that the United States has appealed this decision to the Ninth Circuit. However, there is no indication when such appeal may be heard.

tices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. (*Id.* at 246).

Thus, it was held not sufficient for the governmental entity to prove that the classification resulting from the test scores had a rational basis, that is, that it differentiated between persons who did and did not have some minimum verbal and communication skill. It was necessary, in addition, for the governmental entity to demonstrate that the minimum, verbal and communication skill, in turn, had some rational relationship to the legitimate employment objectives of the employer. And *Washington v. Davis* left intact the holding in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that the employment practice must be a "business necessity." *Id.* at 431.

A. Certification

Plaintiffs have proved that the use of NTE scores by the State in its certification decisions disqualifies substantially disproportionate numbers of blacks. The burden of proof was thereby shifted to the defendants, and in an effort to meet this burden the State commissioned an extensive validity study by ETS. The design of this study is novel, but consistent with the basic requirements enunciated by the Supreme Court, and we accordingly hold such study sufficient to meet the burden placed on defendants under Title VII.

The study seeks to demonstrate content validity by measuring the degree to which the content of the test matches the content of the teacher training programs in South Carolina. It also seeks to establish a minimum

score requirement by estimating the amount of knowledge (measured by the ability to answer correctly test questions that have been content validated) that a minimally qualified teacher candidate in South Carolina would have.

To conduct the study, all 25 of the teacher training institutions in South Carolina were canvassed for experienced teacher educators in the various specialty fields tested in the NTE program. A group of 456 persons with the requisite professional credentials was assembled including representative numbers from each institution and both races. All were volunteers nominated by the colleges themselves. These 456 participants were divided into two general groups. One group was assigned the task of assessing the content validity of the NTE as compared to the curriculum in South Carolina institutions. The other was assigned the task of establishing the minimum score requirement. The two large groups were then each subdivided into panels of about 10 participants assigned to each test in the Common Examinations and each of the Area Examinations. The panelists were given the questions and answers on two current forms of the NTE and asked to record certain judgments about the tests.

Each content review panel member was asked to decide whether each question on the tests involved subject matter that was a part of the curriculum at his or her teacher training institution, and therefore could be judged to be appropriate for use in South Carolina. Each minimum score panel member was asked to look at each of the questions on the test and estimate the percentage of minimally qualified students in teacher education programs in South Carolina who would know the correct answer. Each test was evaluated by teacher educators specializing in the field or one of the major fields covered by the test. Art education teachers evaluated the

test in Art Education; French teachers evaluated the test in French, and so on.

The content review panels determined that from 63% to 98% of the questions on the various tests were content valid for use in South Carolina. The panel members' overview of the tests as a whole also found the NTE to be sufficiently closely related to the curriculum in South Carolina to be an appropriate measure of achievement with respect to that curriculum.

The estimates made by the minimum score panel members (as to the percentage of minimally qualified students who would answer the question correctly) were combined statistically and analyzed to generate scaled scores that reflected, for each test, the level that would be achieved by the minimally knowledgeable candidate. Only test questions that had been determined by a majority of the content review panel members to be content appropriate for use in South Carolina were used in making the minimum score estimates. These scores were 548 on the Common Examinations and a range from 458 (Agriculture) to 690 (Media Specialists) on the Area Examinations.

After receiving the recommended minimum scores the State Board considered a variety of statistical and human factors. Among these considerations were the standard error of measurement of the NTE, the possibility of sampling error in the study, the consistency of the results (internal comparisons of panel results), the supply of and demand for teachers in each specialty field, and the racial composition of the teacher force. It decided to *lower* the minimum scores by one, two, or three standard errors of measurement.

Test	State's New Scores	ETS Study Scores	SEM* Units
Agriculture	940	1006	-2
Art Education	1040	1104	-2
Biology and General Science	1115	1196	-3
Business Education	1071	1167	-3
Chemistry, Physics, and Gen. Science	1100	1158	-2
Early Childhood Education	1052	1124	-2
Education in the Elementary School	1132	1194	-2
Education of the Mentally Retarded	1120	1234	-3
English Language and Literature	1041	1069	-1
French	1144	1210	-2
Home Economics Education	1075	1143	-2
Industrial Arts Education	1100	1162	-2
Mathematics	1113	1203	-3
Librarian-Media Specialist	1178	1238	-2
Music Education	1020	1086	-2
Physical Education	1125	1195	-2
Social Studies	1086	1148	-2
Spanish	1132	1163	-1
Common Examinations	510**	548	-2

* Standard error of measurement.

** The score from the Common Examinations alone is used to certify teachers in specialty fields for which there is no Area Examination under the NTE program.

The design of the validity study is adequate for Title VII purposes. The Supreme Court made clear once again in *Washington v. Davis* that a content validity study that satisfies professional standards also satisfies Title VII. 426 U.S. at 247, n. 13. The defendants called as an expert witness Dr. Robert M. Guion, the principal author of *Standards for Educational and Psychological Tests* published by the American Psychological Association and a nationally recognized authority in the field of testing and measurement who testified in an unqualified fashion that in his expert opinion the ETS study design met all of the requirements of the APA Standards, the Division

14 Principles,¹⁹ and the EEOC Guidelines.²⁰ Two other experts testified similarly, and ETS sought and obtained favorable opinions on the study design, before its implementation, from another two independent experts. The ETS decision to validate against the academic training program rather than job performance is specifically endorsed in principle in *Davis, supra*:

[A] positive relationship between the test and training course performance was sufficient to validate the former, *wholly aside from its possible relationship to actual [job] performance as a police officer*. . . . Nor is the conclusion foreclosed by either *Griggs* or *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and it seems to us the much more sensible construction of the job relatedness requirement. 426 U.S. at 250-251. (Emphasis added).

The principal issue raised by plaintiffs in attacking the validity study is whether the execution of the design was such that the results can be trusted. Plaintiffs deposed 81 of the 456 panel members selected at random and, on the basis of those depositions, claim that the panel members did not prepare for the tasks they were asked to undertake, and did not understand or follow the instructions.

Admittedly, there is a showing from these depositions which indicates some misunderstanding did exist; however, our review of these depositions shows that the misunderstandings were much less extensive than claimed by

¹⁹ Division of Industrial Organizational Psychology (Division 14), American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures* (1975).

²⁰ *Guidelines for Employee Selection Procedures*, 29 C.F.R. 1607 (1970). To the extent that the EEOC Guidelines conflict with well-grounded expert opinion and accepted professional standards, they need not be controlling. *General Electric Co. v. Gilbert*, — U.S. —, 97 S.Ct. 401 (1976).

plaintiffs. When so many people are involved some misunderstanding and failure adequately to follow instructions are inevitable.

The new cutoff scores adopted by the State which are substantially below the scores recommended by ETS after completion of its validation study provide a substantial margin of error.

It appears that most of the deposed panel members recalled receiving the instructions sent in advance of the panel meetings, but did not recall doing any of the preparation suggested by the instructions. We are asked to find that this lack of preparation requires a finding that the results are untrustworthy. It is evident from the design of the study that the panel members were selected on the basis of their professional experience, and it was this experience that they were asked to apply to the task of content review and minimum score determination, not the results of current research in college catalogues or interviews of teaching colleagues. For many, the preparation suggested by the instructions may have been unnecessary. In order to support the allegation of untrustworthiness, plaintiffs would have to offer some evidence as to the necessity of preparation, the reasons why the panel members did not prepare and the effect of the lack of preparation on the panel members' judgments.

We find that the results of the validity study are sufficiently trustworthy to sustain defendants' burden under Title VII. First, the possible error rate was not high. Second, the key question is not whether some of the panel members failed to understand the instructions or for other reasons failed to follow the instructions, but whether they would have reached any different result if they had understood and followed the instructions. Plaintiffs misconceive their burden once defendants have made a reasonable showing that the study was executed in a re-

sponsible, professional manner designed to produce trustworthy results. In order to rebut the presumption that trustworthy results were indeed produced, plaintiffs must not only show that the study was not executed as intended, but also that the results were adversely affected.

Our findings with respect to the validity study end the inquiry for purposes of injunctive relief with respect to the certification system because the regulations now in effect are based on the validity study, and the actions of the State Board in lowering the scores recommended by the study to account for various statistical and human factors were reasonable, and, as before stated, provide and compensate for a substantial margin of error.

However, an ancillary inquiry remains with respect to the 975 minimum score requirement in effect from 1969 through 1976 and not specifically validated. Plaintiff-intervenors' claims for damages bring the legality of that requirement into question. There is nothing in the record to indicate that the requirements of the teaching profession changed substantially from 1969 to 1976 so that what was judged to be the minimum amount of knowledge to graduate from a teacher training program or to teach effectively would have been higher or lower in 1976 than it was in 1969. The State has offered some evidence to the contrary, indicating that the expectations with respect to teacher capability remained about the same during this period.

The 975 minimum score requirement in effect during these years is substantially below the State's new minimum score requirements in every field except in Agriculture, which has been reduced to 940. It is reasonable to conclude, based on the present validity study, that the 975 minimum score excluded only those who did not have the requisite minimum knowledge. The only discrimination question raised is with respect to the classifica-

tion of those who do *not* have minimum knowledge. During the years 1969 through 1976 some of those who lacked minimum knowledge were denied a professional certificate because their scores were below 975, while others who also lacked minimum knowledge but whose scores were above 975 but below the 1976 minimum score requirements, were certified.

In any decision-making process that relies on a standardized test, there is some risk of error. The risk of excluding a truly qualified candidate whose low test score does not reflect his or her real ability can be decreased by lowering the minimum score requirement. That also increases the risk of including an unqualified candidate whose low test score does reflect his or her real ability. The State must weigh many facets of the public interest in making such a decision. If there is a teacher shortage, a relatively high minimum score requirement may mean that some classrooms will be without teachers, and it may be better to provide a less than fully competent teacher than no teacher at all. But to the extent that children are exposed to incompetent teachers, education suffers. It may be that education suffers less than would be the case if classrooms were overcrowded due to lack of teachers. We think it is within the prerogative of the State to accept some unqualified teachers under circumstances where that is judged by the State to be on balance in the public interest, and that such an action by the State is not a violation of Title VII.

There remains, however, the question whether the State has satisfied the "business necessity" requirement set out in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This "business necessity" doctrine appears neither in the explicit language nor the legislative history of Title VII. The Court in *Griggs* and subsequent Title VII cases did not establish judicial standards for determining whether a particular practice is a business necessity. The EEOC

Guidelines are of little assistance because they were published before *Griggs* and have not been updated since that time.²¹

We think that *Griggs* did not import into Title VII law the concept of "compelling interest" developed as a part of the "strict scrutiny" standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance the disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently "compelling" to overcome the disparate impact. It is our view that the Supreme Court intended an examination of the alternatives available with respect to the legitimate employment objective identified by the employer to determine whether there is available to the employer an alternative practice that would achieve his business purpose equally well but with a lesser disparate impact by race. In examining alternatives, the risk and cost to the employer are relevant.

Here, plaintiffs have suggested only one alternative to the use of the NTE for certification purposes. Plaintiffs

²¹ The EEOC re-published these regulations, without change, on November 24, 1976, 41 Fed. Reg. 51985 (1976). The EEOC evidently equates the concept of business necessity with the measurement concepts of statistical and practical significance. 29 C.F.R. § 1607.5(c) provides:

In assessing the utility of a test the following considerations will be applicable:

- (1) The relationship between the test and at least one relevant criterion must be statistically significant. . . .
- (2) In addition to statistical significance, the relationship between the test and criterion should have practical significance.

By their terms, these regulations are applicable only to a criterion-related validity study. The EEOC sets out no analogous requirements for a content validity study.

contend that mere graduation from an approved program should be sufficient and would have a lesser disparate impact on blacks. We cannot find that this alternative will achieve the State's purpose in certifying minimally competent persons equally well as the use of a content-validated standardized test. The record amply demonstrates that there are variations in admissions requirements, academic standards and grading practices at the various teacher training institutions within the State. The approval that the State gives to the teacher training program is to general subject matter areas covered by the program, not to the actual course content of the program, and not to the means used within the program to measure whether individual students have actually mastered the course content to which they have been exposed. The standardized test scores do reflect individual achievement with respect to specific subject matter content, which is directly relevant to (although not sufficient in itself to assure) competence to teach, and thus the use of these scores for certification purposes survives the business necessity test under Title VII.

B. *Pay scales*

There remains, finally, the question whether the uses of the NTE for salary purposes are a violation of Title VII.²² When the salary system was linked to the certification system, some salary benefits were available only by improving the grade of the certificate; and that, in turn, could be done only by achieving certain minimum NTE scores. That system continued in effect after March 24, 1972, when Title VII was made applicable to states, and in 1976, the distribution of teachers within the four

²² These uses, enacted by the Legislature, have remained the same since 1944 and were not changed in 1957, 1969, or 1976, when the certification system was changed by the State Board.

grades of the pay scale system showed a substantial disparate impact by race. A higher proportion of whites (98%) were classified in the two higher grades (A and B) and a higher proportion of blacks (51%) were classified in the lower grades (C and D). By such showing plaintiffs have satisfied their burden of proof under Title VII to shift the burden of proof to the defendants to show a rational relationship to a legitimate employment objective and to show business necessity. The State identifies its legitimate employment objective as providing an incentive for improvement, so that teachers without adequate knowledge to teach effectively will upgrade their capability; and the State offers the same evidence of a rational relationship between its pay scales and this objective as it did with respect to the constitutional challenges. We think that evidence is sufficient to establish the relationship.

We believe that a distinction for pay purposes between those who are qualified as well as between those who are not qualified survives the business necessity test. There appears to be no alternative available to the State, within reasonable limits of risk and cost, for providing the incentive necessary to motivate thousands of persons to acquire, generally on their own time and at their own expense, the necessary additional academic training so that they will be minimally competent teachers. Having made the investment of four years in an undergraduate education, it seems reasonable to try to upgrade the talent of unqualified teachers where possible, rather than rejecting them altogether.

In accordance with the foregoing findings and conclusions, we conclude that plaintiff and plaintiff-intervenors have failed to establish their right to any of the relief sought in their respective complaints. It is, therefore,

ORDERED that judgment be entered in favor of the defendants.

/s/ Clement F. Haynsworth, Jr.
CLEMENT F. HAYNSWORTH, JR.
Circuit Judge

/s/ Donald Russell
DONALD RUSSELL
Circuit Judge

/s/ Charles E. Simons, Jr.
CHARLES E. SIMONS, JR.
District Judge

April 12, 1977.

TRUE COPY

Test:

MILLER C. FOSTER, JR., Clerk

/s/ Joyce Kirby
By: Deputy Clerk

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 703(a) and (b) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2 (1970 ed., & Supp. V)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against,

any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Section 1977 of the Revised Statutes of the United States, 42 U.S.C. § 1981 (1970):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1979 of the Revised Statutes of the United States, 42 U.S.C. § 1983 (1970):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Code of Laws of South Carolina 1976:

§ 59-5-60 (Formerly § 21-45 of the 1962 Code, as amended). General powers of Board.—The State Board of Education shall have the power to:

* * *

(4) Prescribe and enforce rules for the examination and certification of teachers.

(5) Grant State teachers' certificates and revoke them for immoral or unprofessional conduct, or evident unfitness for teaching.

* * *

§ 59-19-90 (Formerly § 21-230 of the 1962 Code as amended). General powers and duties of school trustees.—The board of trustees shall also:

* * *

(2) *Employ and discharge teachers.* Employ teachers from those having certificates from the State Board of Education, fix their salaries and discharge them when good and sufficient reasons for so doing present themselves, subject to the supervision of the county board of education.

* * *

§ 59-21-20 (Formerly § 21-252 of the 1962 Code as amended). Appropriation for teacher salaries based on term of 185 days.—The General Assembly shall make sufficient appropriation to pay the salaries of all school teachers in the public schools on the basis and for the length of one hundred eighty-five days in the elementary and high schools in the State.

§ 59-21-80 (Formerly § 21-258 of the 1962 Code, as amended). Teachers' salary schedule.—Such State aid shall be disbursed to teachers in accordance with the following nine months period salary schedule¹ (the figures under Columns A, B, C and D represent dollars):

¹ Since 1945, the state aid salary schedule has been revised periodically by the Legislature. Each schedule enacted between 1945 and 1975 is contained in Attachment D of the United States First Request for Admissions. The above schedule became effective July 1, 1975.

SOUTH CAROLINA STATE AID TEACHERS' SALARY SCHEDULE

48a

Prior Yrs. Exp.	CLASS 8		CLASS 7		CLASS 6		CLASS 5		CLASS 4		CLASS 3		CLASS 2		CLASS 1		CLASS 0	
	Doctor's Degree		Master's Degree		Bachelor's Degree		Bachelor's Degree		Three Years College		Two Years College		Bachelor's Degree		Bachelor's Degree		Master's Degree	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
0	47.19	47.19	44.31	44.31	42.28	42.28	40.25	40.25	38.22	38.22	36.19	36.19	34.16	34.16	32.13	32.13	30.10	30.10
1	48.63	48.63	45.75	45.75	43.72	43.72	41.69	41.69	39.66	39.66	37.63	37.63	35.60	35.60	33.57	33.57	31.54	31.54
2	50.07	50.07	47.19	47.19	45.16	45.16	43.13	43.13	41.10	41.10	39.07	39.07	37.04	37.04	35.01	35.01	32.98	32.98
3	51.51	51.51	48.63	48.63	46.60	46.60	44.57	44.57	42.54	42.54	40.51	40.51	38.48	38.48	36.45	36.45	34.42	34.42
4	52.95	52.95	50.07	50.07	48.04	48.04	46.01	46.01	43.98	43.98	41.95	41.95	39.92	39.92	37.89	37.89	35.86	35.86
5	54.39	54.39	51.51	51.51	49.48	49.48	47.45	47.45	45.42	45.42	43.39	43.39	41.36	41.36	39.33	39.33	37.30	37.30
6	55.83	55.83	52.95	52.95	50.92	50.92	48.89	48.89	46.86	46.86	44.83	44.83	42.80	42.80	40.77	40.77	38.74	38.74
7	57.27	57.27	54.39	54.39	52.36	52.36	50.33	50.33	48.30	48.30	46.27	46.27	44.24	44.24	42.21	42.21	40.18	40.18
8	58.71	58.71	55.83	55.83	53.80	53.80	51.77	51.77	49.74	49.74	47.71	47.71	45.68	45.68	43.65	43.65	41.62	41.62
9	60.15	60.15	57.27	57.27	55.24	55.24	53.21	53.21	51.18	51.18	49.15	49.15	47.12	47.12	45.09	45.09	43.06	43.06
10	61.59	61.59	58.71	58.71	56.68	56.68	54.65	54.65	52.62	52.62	50.59	50.59	48.56	48.56	46.53	46.53	44.50	44.50
11	63.03	63.03	60.15	60.15	58.12	58.12	56.09	56.09	54.06	54.06	52.03	52.03	50.00	50.00	47.97	47.97	45.94	45.94
12	64.47	64.47	61.59	61.59	59.56	59.56	57.53	57.53	55.50	55.50	53.47	53.47	51.44	51.44	49.41	49.41	47.38	47.38
13	65.91	65.91	63.03	63.03	61.00	61.00	58.97	58.97	56.94	56.94	54.91	54.91	52.88	52.88	50.85	50.85	48.82	48.82
14	67.35	67.35	64.47	64.47	62.44	62.44	60.41	60.41	58.38	58.38	56.35	56.35	54.32	54.32	52.29	52.29	50.26	50.26

The Professional and the Grade A Certificate carry the same State Aid. Group designations do not apply to the Professional Certificate and the Warrent.

1st Figure — Salary for 1 day.
2nd Figure — Salary for 185 days.

49a

§ 59-25-20 (Formerly § 21-354 of the 1962 Code). Qualifications of teachers.—No board of school trustees shall hereafter employ any teacher who has not a certificate to teach in the free public schools of the State. This provision, however, shall not affect the employment of any teacher now teaching in any of the schools of the special school districts. The trustees of any such school may also impose any additional examinations and qualifications they may deem proper before or after employing any teacher.

§ 59-25-110 (Formerly § 21-371 of the 1962 Code, as amended). System for examination and certification of teachers.—The State Board of Education, by rules and regulations, shall formulate and administer a system for the examination and certification of teachers.

APPENDIX C

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action File No. 75-1610

[Filed April 14, 1977]

UNITED STATES OF AMERICA,
Plaintiff,

—and—

SOUTH CAROLINA EDUCATION ASSOCIATION, THE NATIONAL
EDUCATION ASSOCIATION OF THE UNITED STATES,
NATHANIEL BROWN, EUNICE DOE, WILLIE EDNEY,
ROBERTA F. HILL, ANITA P. HUNTER, DAVID LAWRENCE,
EDWARD PINCKNEY, ADOLPH SIMMONS,
Plaintiff-Intervenors,

—versus—

STATE OF SOUTH CAROLINA, SOUTH CAROLINA STATE
BOARD OF EDUCATION, SOUTH CAROLINA STATE RETIRE-
MENT SYSTEM, SOUTH CAROLINA BUDGET AND CONTROL
BOARD, CHARLESTON COUNTY BOARD OF EDUCATION,
COLLETON COUNTY BOARD OF EDUCATION, RICHLAND
DISTRICT No. 1 BOARD OF EDUCATION, ON BEHALF OF
THEMSELVES AND ALL OTHER BOARDS OF EDUCATION
OF SIMILARLY SITUATED PUBLIC SCHOOL DISTRICTS,
Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable Clement F. Haynsworth, Jr., United States Circuit Judge, Honorable Donald Russell, United States Circuit Judge, and Honorable Charles E. Simons, Jr., United

States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the Plaintiff take nothing, that the action is dismissed on the merits, and that the Defendants recover their costs of action.

Dated at Columbia, South Carolina, this 14th day of April, 1977.

MILLER C. FOSTER, JR.
Clerk of Court

By: /s/ Joyce Kirby
JOYCE KIRBY, Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 75-1610

[Filed June 13, 1977]

UNITED STATES OF AMERICA,
Plaintiff,
and

SOUTH CAROLINA EDUCATION ASSOCIATION, *et al.*,
Plaintiff-Intervenors,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the National Education Association of the United States, the South Carolina Education Association, Inc., Nathaniel Brown, Eunice Doe, Willie Edney, Roberta F. Hill, Anita P. Hunter, David Lawrence, Edward Pinckney and Adolph Simmons, all of whom are plaintiff-intervenors in the above-captioned case, hereby appeal to the Supreme Court of the United States from the judgment entered on April 14, 1977, dismissing this action.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Stephen J. Pollak
STEPHEN J. POLLAK
Counsel for the National Education
Association

/s/ Craig K. Davis
CRAIG K. DAVIS
Counsel for the South Carolina
Education Association and the
Individual Plaintiff-Intervenors

TRUE COPY

Test:

MILLER C. FOSTER, JR., Clerk

/s/ Margaret Truesdale
By: Deputy Clerk

NOV 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-422 and 77-543

NATIONAL EDUCATION ASSOCIATION, ET AL., APPELLANTS,

versus

STATE OF SOUTH CAROLINA, ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANTS,

versus

STATE OF SOUTH CAROLINA, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM FOR THE STATE PARTIES

DANIEL R. McLEOD,
Attorney General,
Post Office Box 11549,
Columbia, South Carolina 29211,

RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, South Carolina 29208,

KENNETH L. CHILDS,
Suite 920, Bankers Trust Tower,
Columbia, South Carolina 29201,

ATTORNEYS FOR APPELLEES.

OF COUNSEL:

CONSTANGY, BROOKS & SMITH,
Suite 920, Bankers Trust Tower,
Columbia, South Carolina 29201

KATHERINE W. HILL,
KENNETH P. WOODINGTON,
Assistant Attorneys General,
Post Office Box 11549
Columbia, South Carolina, 29211.

Date: November 18, 1977.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-422 and 77-543

NATIONAL EDUCATION ASSOCIATION, ET AL., APPELLANTS,

versus

STATE OF SOUTH CAROLINA, ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANTS,

versus

STATE OF SOUTH CAROLINA, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM FOR THE STATE PARTIES

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of the Supreme Court of the United States, the State Appellees move to affirm the final judgment and decree of the District Court on the ground that it is manifest from the record that the questions raised by the Appellants and upon which the decision of this case depends are primarily (a) questions of fact involving no clear error by the lower court or, (b) questions of law substantially answered by recent decisions of this Court, and are thus not significant enough to warrant plenary consideration by this Court.

QUESTIONS PRESENTED

I

Whether the District Court's finding that there is no racially discriminatory purpose behind (a) South Carolina's teacher certification examination and (b) the formula for allocating State funds to supplement teacher salaries is "clearly erroneous" in view of substantial evidence in the record that both the examination and the allocation formula were established for nondiscriminatory reasons?

II

Whether there is so little relationship between a person's knowledge of subject matter and that person's ability to teach that South Carolina may not lawfully use a professionally validated examination which measures knowledge of subject matter as one factor in (a) teacher certification and (b) the formula allocating State funds to the local districts to supplement teacher salaries?

STATEMENT OF THE CASE

This case involves South Carolina's use of the National Teacher Examinations (NTE), a series of standardized objective tests designed and administered by the Educational Testing Service¹ (ETS), to license teachers who teach in the State's public school system. For more than thirty years, pursuant to its authority "to prescribe and enforce rules for the classification and certification of teachers,"² the South Carolina State Board of Education (State Board) has required all candidates for certification to take the NTE and has used these scores both to license teachers and to allocate State funds to the local school districts

¹ A non-profit corporation, located in Princeton, New Jersey.

² Section 59-5-60, Code of Laws of South Carolina, 1976.

which actually employ and pay the teachers.³ The need for testing teacher candidates arose in an era when many teachers had not finished or even attended college. The problem of wide disparity in admission and grading standards at teacher training colleges persists today. Plaintiffs-Appellants are seeking a declaratory judgment that the pertinent laws and regulations are invalid, and injunctive relief enjoining the State from enforcing these laws and regulations insofar as they require attainment of a prescribed NTE score as a prerequisite for certification as a teacher.

PROCEEDINGS BELOW

This action was brought by the United States government through its Attorney General on September 15, 1975, against the State of South Carolina, the South Carolina State Board of Education, the State Retirement Fund, the Budget and Control Board (the State Defendants), and three local school districts⁴ alleging that South Carolina's use of the NTE to certify teachers and its allocation of teacher salary funds to the local districts based in part on the teachers' NTE scores were in violation of Title VII of the 1964 Civil Rights Act⁵ and the Fourteenth Amendment.

³ In South Carolina, the local school boards hire, fire, supervise and pay teachers. Section 59-19-90, Code of Laws of South Carolina, 1976, as amended. Funds for teacher salaries are derived from three sources: local, state and federal governments. In 91 of the State's 92 school districts some teachers are paid entirely from local or federal funds. In 1975-76, the State's three largest districts, Charleston, Greenville, and Richland No. 1 (Columbia) had 298, 306, and 261 teachers respectively who were paid entirely with local funds. Most teachers are paid from a combination of local funds and a State salary supplement disbursed by the local district. 1975-76 *Financial Report, State of South Carolina Department of Education*.

⁴ The Board of Trustees of the Charleston County School District, the Colleton County Board of School Trustees, and the Board of School Commissioners of School District No. 1 of Richland County. Plaintiffs sought to bring their action against a defendant class of all local school boards within the State and sought to certify the class pursuant to Rule 23, Federal Rules of Civil Procedure. The motion was denied for the reasons set forth in the Court's Opinion. See NEA J. S. App. at pp. 4a-5a.

⁵ 42 USC Section 2000e.

On September 17, 1975, the South Carolina Education Association, the National Education Association and nine named individuals as class plaintiffs brought suit against the same defendants in their official and individual capacities basing their action upon the Fourteenth Amendment and Title VII and alleging in addition violations of Sections 1981 and 1983 of Title 42 of the United States Code. Thereafter, these private plaintiffs moved to intervene in the action brought by the United States. When their motion was granted, they became plaintiff-intervenors and their separate action was stayed.⁶

Since the plaintiffs' allegations included claims that several South Carolina statutes were unconstitutional, a three-judge court (Haynsworth, Chief Circuit Judge; Russell, Circuit Judge; Simons, District Judge) was convened pursuant to 28 USC Section 2281.⁷ By further order of the Court the action was bifurcated with issues of liability to be considered first and the issue of damages along with the certification of the alleged plaintiff class reserved for later determination if necessary.⁸

Discovery was exhaustive, extending over a nine-month period with the final submission to the Court of over one hundred (100) depositions, documentary evidence amounting to more than 20,000 pages (17 file boxes), and a three-volume validity study.⁹ Lengthy proposed findings and briefs were submitted by both sides. Additionally, ETS filed a brief as *amicus curiae* supporting the NTE and the validity study. The case was argued before the three-judge

⁶ Order No. 1, Civil Action No. 75-1610, United States District Court for the District of South Carolina, Columbia Division. The United States and the plaintiff-intervenors will be referred to collectively as the Plaintiffs in this Motion.

⁷ This action predates the 1976 amendments to 28 USC Section 2281.

⁸ See n. 6, *supra*.

⁹ The ETS report of the study was entitled *Report on a Study of the Use of the National Teacher Examinations by the State of South Carolina*. This report was part of the record. See Manning Deposition, Ex. D-8, S-MAN 32A, 32B, and 32C.

panel on August 13, 1976, and decided on April 12, 1977, in a forty-four page opinion. The opinion of the District Court reviewed the history of the State's certification program and its use of the NTE from the 1940's through the major revision of the certification system in 1976. Through its review of the evidence the Court concluded that the Defendants had assumed and successfully met the burden of rebutting Plaintiffs' allegations of purposeful discrimination and in fact had convincingly demonstrated a consistent program of teacher certification and an allocation of State funds designed to improve the quality of education in the State.¹⁰ The opinion also concluded that the State had the right, under both constitutional and statutory standards, to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary for effective teaching.¹¹ Both the United States and the plaintiff-intervenors filed notices of appeal on June 13, 1977.

THE NTE

South Carolina, in common with other states, requires completion of at least a bachelor's degree at a post-secondary institution as a prerequisite for certification as a school teacher.¹² However, the State has concluded that academic training is subject to too much variation from one

¹⁰ "The evidence in the record supports the finding that South Carolina officials were concerned with improving the quality of public school teaching, certifying only those applicants possessed of the minimum knowledge necessary to teach effectively, using an objective measure of applicants coming from widely disparate teacher training programs, and providing appropriate financial incentives for teachers to improve their academic qualifications and therefore their ability to teach." NEA J. S. App. at 24a.

¹¹ NEA J. S. App. at 24a.

¹² A bachelor's degree was not always a prerequisite to certification. In 1945 only two years of college training were required of candidates for certification and of the certificates outstanding at that time, many were based not on regular college attendance but on attendance at one district summer school or a six week term of normal school. Ex. P-133.

institution to another for a college degree to provide a uniform measure of competence to teach¹³. Accordingly, the State also requires each person presenting himself for certification to demonstrate his knowledge of the subject matter taught in college on a battery of nationally-standardized, objective tests—the NTE. This has been a uniform, state-wide requirement for all teacher candidates since 1945.¹⁴

The NTE were first developed in 1940 by the American Council on Education for the purpose of providing a set of standardized tests of high quality that could be used by educators to assess the quality of undergraduate teacher training. The NTE consist of two principal components: the Common Examinations that test elements of teacher training common to all fields (i.e., general education and professional education) and the 28 Area Examinations that test knowledge specifically relevant to one area of specialization (e.g., French, mathematics, physical education).¹⁵

¹³ This conclusion has been reached in every study of the State certification program since 1941. The special committee (See n. 18, *infra*.) studying certification in South Carolina in 1941 noted:

... all studies indicate great variability in educational attainment between graduates of different institutions and between individuals.

In 1968 the "Final Report" (See n. 34, *infra*.) observed:

However it was recognized by the committee that not all four year colleges granting degrees have the same resources and strengths. Since some admission standards do not reflect a quality control, the committee felt that some other kind of quality control needs to be established for admission into the profession.

Ex. D-23; Ex. P-93, Attachment C.

¹⁴ See opinion of the District Court, NEA J. S. App. at 3a. See also *Teacher Compensation in South Carolina, A Pioneering State Looks Ahead*, by Arthur L. Benson, Director, Teacher Examinations, Educational Testing Service, Princeton, New Jersey (Manning Deposition Ex. D-8, S-MAN-35):

South Carolina can take pride in the fact that it was the first state to recognize the contributions which modern objective examinations can make to improving the quality of teachers and to upgrading institutional standards for teacher preparation.

¹⁵ The record below was extensively developed with respect to the description of the NTE program, including the development, scoring, statistical properties, use, validity, and possible racial bias of the NTE, primarily in the deposition of Dr. Winton H. Manning, a vice president of ETS. See Manning Deposition. This deposition alone, in evidence

This division reflects the basic organization of teacher training programs in South Carolina and throughout the country. The court below in considering the evidence with respect to the design and construction of the NTE stated:

The record supports the conclusion that the NTE are professionally and carefully prepared to measure the critical mass of knowledge in academic subject matter. The NTE do not measure teaching skills but do measure the content of the academic preparation of prospective teachers.¹⁶

A candidate's performance on the NTE is reported as a score on a scale which generally ranges from 300 to 900 points on each of the two components of the test. Composite scores are computed by adding the Common Examinations score to the Area Examination score; the range of composite scores runs from 600 to 1800.

The NTE are screened to eliminate material that might be biased against minority group students. Moreover, there are no questions that are systematically answered incorrectly by minority group persons by virtue of culture-specific usage, that is, where words used commonly have different meanings for whites and blacks. Plaintiffs' apparent recognition of the lack of cultural bias was noted by the District Court: "Plaintiffs have not contended nor proved that the NTE are racially biased or otherwise deficient when measured against the applicable professional and legal standards."¹⁷

before the court, was almost 2000 pages in length, in addition to 188 written questions on cross, 174 questions on redirect, and 54 questions on recross. See NEA J. S. App. at 5a-6a and 25a.

¹⁶ NEA J. S. App. at 25a.

¹⁷ *Id.*

USES OF THE NTE IN SOUTH CAROLINA

The history of the NTE in South Carolina begins with the report of a committee of educators and citizens familiar with the problems of education, appointed by the South Carolina Legislature in early 1941 to investigate the statutes dealing with education.¹⁸ The committee consulted many sources: educators of both races, professional associations including the South Carolina Teachers Association (the predecessor of the plaintiff SCEA in this case) and representatives of the U. S. Office of Education. This committee in a written report recommended an overhaul of numerous aspects of school administration (none of which is relevant here) and of the method of certifying teachers and allocating their State aid salary supplements.

With respect to teacher certification and salary, the committee was immediately faced with a dilemma. At the time, South Carolina had a dual teacher classification system under which blacks and whites with comparable qualifications received different salaries. The committee recognized the correctness of *Alston v. School Board of Norfolk*, 112 F. 2d 992, cert. denied 311 U. S. 693 (1940), a recent Virginia case declaring separate classification of teachers by race to be unconstitutional, but also realized that the quality of teachers in South Carolina was far too disparate to warrant an across-the-board equalization of salaries.¹⁹ Specifically, only one-fourth of the black teachers and two-thirds of the white teachers held college degrees.²⁰ Accordingly,

¹⁸ Report of the Committee Appointed Pursuant to Senate Resolution No. 61 (H. 74) "To Make an Investigation of the Statutory Laws of South Carolina Dealing with Education, Etc.," 1941 (Ex. No. D-23) (hereinafter the 1941 Report).

¹⁹ "As the committee has indicated, the existing teacher certificate gave little real evidence of a teacher's value. The first grade certificates do not even represent college credits. The holder of a doctor's degree has the same certificate that thousands who have no college degree hold." (1941 Report at p. 14.)

²⁰ Id.

the 1941 committee recommended that an exhaustive study be conducted to determine a new method for the certification of teachers, a method which would recognize merit and in which race would not be a factor.²¹

The State Department of Education promptly implemented this recommendation by appointing a committee to produce a study on the revision of the teacher classification system. Although only passing reference is made to the study in the two Jurisdictional Statements, it was in fact conducted in the years 1942-44, using data from 7500 black and white South Carolinians, including principals, administrators, classroom teachers and pupils. The conclusion of the study, published in four hardbound volumes in 1944, was that the NTE would be a suitable means, along with a teacher's amount of education and experience, for evaluating teachers objectively.

In 1945, the State Board of Education adopted the basic recommendations of the study and implemented a certification plan involving four grades of certificates (designated A, B, C, and D) based on the candidate's NTE scores. No candidate, regardless of how low his score, was denied a certificate. There was no limit on the number of times any teacher could take the examination.²² Concurrently with the new certification standards, the South Carolina General Assembly included in the Appropriations Act a revised state salary schedule which allocated funds to the

²¹ Id. The District Court characterized this study as an "earnest effort in its time." NEA J. S. App. at 13a.

²² NEA J. S. App. at 9a.

local school districts for teacher salaries on the basis of three factors.²³

- (1) the extent of a teacher's education (with classifications ranging from less than two years of college to a master's degree and later to a doctorate degree);
- (2) the amount of teacher knowledge (measured by performance on the NTE); and
- (3) the extent of a teacher's experience (with yearly increments for teachers with bachelor's degrees continuing until the fourteenth year).

Race was no longer a factor in determining state salary aid. Henceforth the State appropriated the same amount of money per teacher, black or white, to each school district, for each specific certification level.²⁴

Plaintiffs' observation that the 1945 Certification Plan resulted in more whites than blacks receiving A and B certificates is not disputed. However, available statistics indicated that only 24% of the black in-service teachers were college graduates as opposed to 64% of the whites.²⁵ Thus, *any* objective measurement of the teaching force at the time was bound to reflect this disparity in educational attainment. The introduction of graded certificates did not, however, merely continue the former pay scales under a different guise. Although the United States asserts that "the certification levels of virtually all of the black educators were downgraded coincident with the [1945] elimination of the dual pay system"²⁶ the new certification and salary schedule was in fact predicted to result in a salary *cut* for 67% of the *white* teachers (those in the B and C

²³ The South Carolina legislature has made approximately thirty-four separate annual decisions to enact a formula for distributing State funds and for appropriating funds pursuant to that enactment. Currently, Sections 59-21-70 and 59-21-80, Code of Laws of South Carolina, 1976, set forth the formula.

²⁴ See footnote 3, *supra*.

²⁵ 1941 Report, at 11.

²⁶ US J. S. at 27.

classifications) and a salary *raise* for 63% of the *black* teachers.²⁷

Almost immediately after the new certification system was put into effect, a class action was brought to challenge the salary schedule in one county (the county portion of teachers' salaries was not subject to the new State system). The Federal District Court (Judge Waring), by way of comparison, examined the new State certification and salary system, noting that:

The concern of this court is whether it is free from the tinge of racial prejudice, and I find it so to be.²⁸

and concluding that while the prior dual pay system was arbitrary the new system had "eliminated entirely any danger of disparity or discrimination by reason of race or color."²⁹

In 1957, the concept of a cutoff score, below which candidates would not be certified, was introduced in a limited fashion. The cutoff score was 332, only 32 points above the minimum score of 300. This change eliminated very few candidates—less than 1% of the white candidates and less than 3% of the black candidates—and the score fell in the bottom 1% in the national percentile rankings.³⁰ In considering the 1957 decision, the District Court observed:

Again we find nothing in the record to support a finding of discriminatory intent . . . [T]he State

²⁷ See tables on pp. 8 and 22, US J. S. 37% of the black teachers (those in the D classification) were predicted to receive a salary cut of 75 cents per month. As it turned out, both races scored higher than predicted in the first official administration of the test in 1945. The above figures are used, however, because they are the ones relevant to intent.

²⁸ *Thompson v. Gibbs*, 60 F. Supp. 872, 876 (EDSC 1945).

²⁹ *Id.*, at p. 878.

³⁰ See NEA J. S., at 10, n. 13. Between July 1, 1957, and July 1, 1969, the Board denied D certificates to persons scoring below 332 on the Commons. This score requirement was so low however that it had almost no exclusionary impact. An ETS commentator noted in the 60's that the score should be raised "to a point where the achievement of this license to practice will promise at least minimal literacy." Ex. D-8, S-MAN-35.

Board did not move to change the system when it discovered that very few blacks were excluded, and significantly this system was maintained for over 11 years.³¹

In 1969, a more substantial change took place in the State's method of certifying teachers and determining State aid salaries. By that time, C and D teachers were entering the job market in numbers far exceeding the demand for them.³² Moreover, enough teachers with bachelor's degrees were entering the market to fill all positions, a significant change from the situation which existed in 1945. In addition, both the General Assembly and the Governor were interested in upgrading South Carolina teachers' salaries to the southeastern average.³³

A committee of 41 persons, including a number of black educators, was appointed in late 1967 to study the possibility of raising teachers' salaries and revising the certification procedure.³⁴ In 1969 this committee recommended the use of the composite examinations (i.e., including the teacher area examinations) for the first time, with the standard, or professional, certificate requiring a 975 score. In most teaching areas, this score was still no higher than the 10th percentile nationally.³⁵ The abolition of the graded

³¹ NEA J. S. App. at 14a.

³² For instance, in one year alone, 1966-67, over 280 newly certified C and D teachers entered the job market. Ex. P-104. However, by 1975-76, only 399 C teachers and 31 D teachers remained in the teaching force. Ex. P-139.

³³ Ex. P-91; P-M-32.

³⁴ Teacher Certification and Salary Study Committee, Final Report (Curry McArthur, Chairman), August 15, 1968, Ex. P-93, Attachment C. NEA J. S. App. at 14a-15a, 21a-23a.

³⁵ NTE Technical Handbook, Ex. D-8, S-MAN-9.

certificate system was also recommended.³⁶ In addition, the committee recommended that "warrants," or provisional certificates, be issued for persons scoring between 850 and 975.³⁷ By permitting persons with NTE scores of as low as 850 (out of a possible 1800, with 600 the minimum possible score), to teach, the committee descended to the 4th or 5th percentile of applicants nationally.³⁸ In a significant change from past procedure, however, the committee recommended that substandard (i.e., warrant) teachers be paid the same as fully certified teachers, with step increases each year for the first five years.³⁹ The warrant teacher was thus given a five-year opportunity to improve his knowledge of subject matter without being penalized financially in the meantime. The State Department of Education in 1969 adopted and implemented the committee's recommendations, effective July 1, 1969. The new scores eliminated 30% of the black candidates and 1% of the white candidates for certification.⁴⁰ However, no comparable disparity was created in the actual teaching force in South Carolina. Six years after the new scores had been im-

³⁶ "It was reasoned that the conditions which made the grading of certificates sensible in 1945 no longer exist and that those who meet the minimum requirements for a professional certificate in South Carolina should not have their credentials graded A, B, C, and D, but should be issued the same credential with the same amount of State aid allotted." Ex. P-93, Attachment C, at 4.

As was previously noted *supra*, at p. 8, in 1945 a substantial number of the State's teachers did not have a four year bachelor's degree.

³⁷ Plaintiffs' statement that the warrant is a "temporary" certificate (US J. S. at 11) is inaccurate. The warrant is renewable on the same basis as the professional certificate. Ex. P-133.

³⁸ NTE Technical Handbook, *supra*, n. 35.

³⁹ Ex. P-93, Attachment C, at 11.

⁴⁰ Plaintiffs concede that "this was the first use of the NTE by the State to exclude an appreciable number of candidates." NEA J. S. at 10.

plemented blacks constituted 29.3%⁴¹ of the teachers in a State with a 30.5% black population.⁴²

The District Court specifically considered the evidence with respect to this revision in the certification requirement (the requirement of a composite score on the NTE, the use of the warrant credential and the cessation of graded certificates) and concluded:

We are unable to find any intent to discriminate with respect to this decision. Plaintiffs offer no direct evidence of such an intent, even though one obvious source, the black members of the committee, was apparently available to them. The State's authority to redefine minimal competence from time to time cannot reasonably be questioned.⁴³

THE VALIDITY STUDY AND THE 1976 CERTIFICATION REVISION

In late 1975, several months prior to the commencement of this lawsuit, the State entered negotiations with ETS to have a validation study of the NTE conducted. As a result, ETS proposed and the State accepted a study based on a design later described as "pioneering" by the principal author of the APA Standards and Principles for the Validation and Use of Personnel Selection Procedures.⁴⁴

⁴¹ NEA J. S. App at 10a.

⁴² *Id.* The percentage of blacks in the employment pool is much lower than the percentage of blacks in the total population. See, *infra*, at 24, n. 11.

⁴³ NEA J. S. App. at 15a.

⁴⁴ The witness, Dr. Robert Guion, described the study as being "a pioneering kind of design," which, using "a very creative method," did a "thorough job in laying out the issues that have to be considered and establishing an operating cutoff score which is a policy decision, not a technical one." When asked whether the design was professionally acceptable, Dr. Guion responded:

I thought it went beyond what would be called "professionally acceptable" . . . I would characterize as professionally acceptable in quotes as being something minimally acceptable or something of that sort. And this would certainly be more than that.

Ex. D-5 at 24, 34.

The study was designed to address: (1) the relationship between the content of the test and the content of teacher training programs within the State, and (2) the level of performance on the NTE that might be expected of a candidate who is judged to have the minimum amount of knowledge necessary to complete an academic program in teacher education in South Carolina and to teach effectively in the schools of South Carolina. It was planned and prepared by eighteen professional staff members of ETS, supervised by an ETS vice president, Dr. W. H. Manning,⁴⁵ and reviewed and approved by four independent professionals in the field of testing and measurement. Four hundred and fifty-six (456) black and white educators, nominated by the faculties of the teacher training institutions in South Carolina, participated in the validity study. The educators were constituted into panels of professional "juries" to evaluate the NTE as a measure of minimal mastery of the subject matter taught in the teacher training programs throughout the State. A considerable body of professional literature supported this kind of approach to content validation. All four of the independent experts who reviewed the design of the study were uniformly complimentary.⁴⁶

The panel responses were collated and evaluated by using generally accepted psychometric techniques. The results of the three-month study are set forth in a 300-page report, delivered to the State Board of Education in January, 1976.

⁴⁵ The expert qualifications of Dr. Manning are set forth in detail in his deposition, Ex. D-8, at 16-18, and are supplemented by a list of his publications contained in Ex. D-8, S-MAN-1.

⁴⁶ Each of the four experts submitted detailed comments to ETS. Letter from Linn to Stuart, dated September 27, 1975; letter from Linn to Stuart, dated November 24, 1975 (Ex. D-8, S-MAN-18); letter from Krathwohl to Masonis, dated October 5, 1975; letter from Krathwohl to Masonis, dated October 27, 1975 (Ex. D-8, S-MAN-19); Guion Deposition, pp. 23-26 (Ex. D-5); Manning Deposition, pp. 260-263, 893-922 (Ex. D-8).

The validity study showed that in general between 85% and 90% of the questions on the NTE were appropriate for use in measuring the content of teacher training programs in South Carolina.⁴⁷ Moreover, the study concluded that in most teaching areas (agriculture being the only exception) a score considerably higher than the 975 set in 1969 was necessary to indicate that a prospective teacher possessed the minimum level of academic knowledge to teach.⁴⁸

After additional study by the standing committee on Teacher Recruitment Training and Compensation and the department staff, the State Board established new minimum composite scores, one, two, or three standard errors of measurement *lower* than those that were supported by the validity study,⁴⁹ and eliminated entirely the provisional or warrant certificate. In reaching these decisions the State Board (which is biracial) considered sampling error in the validity study, consistency of results, supply and demand for teachers, racial composition of the teaching force and

⁴⁷ Ex. D-8, Manning Deposition, S-MAN-32C.

⁴⁸ NEA J. S. App. at 36a.

⁴⁹ The committee's study analysis and procedures are set out in a lengthy report to the State Board of Education which is part of the record. Report of the Committee on Teacher Recruitment, Training and Compensation. (Ex. D-28, D-32.) See also NEA J. S. App. at 3a and 35a.

effect on teacher training programs.⁵⁰ These new scores reflect great caution, with the obvious effect of possible over-inclusion of candidates in the teaching force rather than under-inclusion.⁵¹ With respect to the 1976 scores the District Court stated:

[T]he actions of the State Board in lowering the scores recommended by the study to account for various statistical and human factors were reasonable, and, as before stated, provide and compensate for a substantial margin of error.⁵²

⁵⁰ The resulting scores are as follows:

Area	Study Score	New Score *	SEM Units
Agriculture	1006	940	-2
Art Education	1104	1040	-2
Biology and General Science	1196	1115	-3
Business Education	1167	1071	-3
Chemistry, Physics, and General Science	1158	1100	-2
Early Childhood Education	1124	1052	-2
Education in the Elementary School	1194	1132	-2
Education of the Mentally Retarded	1234	1120	-3
English Language and Literature ..	1069	1041	-1
French	1210	1144	-2
Home Economics Education	1143	1075	-2
Industrial Arts Education	1162	1100	-2
Mathematics	1203	1113	-3
Librarian-Media Specialist	1238	1178	-2
Music Education	1086	1020	-2
Physical Education	1195	1125	-2
Social Studies	1148	1086	-2
Spanish	1163	1132	-1
Common Examinations	548	510	-2

* Out of 1800 maximum.

⁵¹ After reduction of the cutoff score by two standard errors of measurement below the score supported by the study, the minimum score requirement involves a risk of not certifying a maximum of two candidates per hundred who are actually minimally qualified. Reduction by three standard errors of measurement puts the risk at less than one per thousand. The quantification of the risk at one, two and three SEM below the scores reported in the ETS study is set out in Ex. D-8, S-MAN 32A, Table 33, at 124.

⁵² NEA J. S. App. at 39a.

GROUND FOR GRANTING THE MOTION TO AFFIRM

Although there are hosts of major and minor points in dispute between the Plaintiffs and the State Defendants in this case, the approach taken in the decision below narrows the issues that must be considered by the Court at this stage of the appeal. The District Court reached two conclusions of primary importance: (1) that South Carolina's use of the NTE has had no racially discriminatory purpose, and (2) that the NTE have been properly validated as measures of job-related knowledge. The combination of these two conclusions is decisive. If there is no discriminatory purpose behind the use of the NTE and if the NTE are valid measures of job-related knowledge, the Plaintiffs' case collapses on any legal theory available to them. Therefore, in deciding whether this appeal merits plenary review, the Court need only look to the District Court's decision on these two critical points. If it is satisfied that the lower court did not commit reversible error in reaching either conclusion, summary affirmance is warranted.¹

¹ This Court's task is further simplified by the fact that the following points were not disputed by any party in the Court below:

- (1) Knowledge of the subject matter taught in college-level teacher training programs in South Carolina is a "job-related" qualification for teaching.
- (2) The NTE themselves are not culturally or racially biased.
- (3) The NTE have a differential impact upon blacks and whites in South Carolina.
- (4) Prior to 1945 South Carolina maintained a dual system of teacher classifications.

I

The District Court was not "clearly erroneous" in finding no discriminatory purpose, in view of evidence that South Carolina's system of teacher certification and its formula for State salary supplements (1) are the result of a consistent program since 1941 to improve the quality of public education in the State; (2) were instituted, in part, for the express purpose of ending the previous system of dual classification of black and white teachers; (3) have been accomplished with the assistance of black educators in the State, the federal government, national education associations, and independent experts in education testing; and (4) have consistently resulted in a percentage of black teachers substantially equal to the percentage of total black population in the State.

On the issue of discriminatory intent, a reading of the opinion below reveals that no substantial questions of law are presented for decision by this Court. The opinion of the District Court applied precisely the legal theories which Plaintiffs contend are applicable.² All that remains is a factual dispute, which was resolved by the District Court in favor of the Defendants, but which Plaintiffs seek to relitigate here.

A fair reading of the opinion of the District Court demonstrates that the Defendants were required to, and did, bear the burden of showing nondiscriminatory pur-

² NEA J. S., at 23-25; US J. S., at 20-21, 28n. 30.

pose in response to the *prima facie* case of the Plaintiffs.³ The District Court did entertain appropriate inferences based on the Plaintiffs' evidence standing alone but was convinced by massive evidence introduced by the Defendants in rebuttal that racially neutral purposes lay behind the State's use of the NTE.

In its discussion of the certification issue, the Court said, "Although the historical background of segregated schools might provide some basis for the inference urged by Plaintiffs, any such inference has been rebutted" (NEA J. S. App. at 13a). And with respect to the use of certification to allocate salary supplements, the Court found, "We are unable to find a discriminatory intent from these facts, even though the historical background . . . provide[s] some support for such an inference. Such inference is adequately rebutted by the evidence with respect to what the legislature actually did." (NEA J. S. App. at 21a.) Such language cannot be read as leaving the burden on the Plaintiffs. The State never disputed its burden of coming forward with rebuttal evidence on the question of intent and produced full evidence on the question. Consistent with the standard set forth in *Keyes v. School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973), the District Court required that the State rebut Plaintiffs' case not by showing that it was

³ NEA J. S. App., at 9a-17a. The State assumed the burden upon a *prima facie* showing that the NTE show a significant statistical disparity by race, and that prior to 1945 South Carolina had a dual system of teacher classification based on race.

The Plaintiffs' claims that the 1976 scores would eliminate up to 100% of the otherwise qualified black candidates (US J. S., at 15) and entrust teaching in South Carolina exclusively to the white race (NEA J. S., at 21) rest on a data base of two (2) persons who failed to meet the new scores on two of the area exams (Spanish, and Chemistry, Physics and General Science). Ex. P-80B. The State Defendants dispute Plaintiffs' characterizations of the impact that the NTE has on black candidates. Their figures are statistically unreliable and the conclusions they draw from them are inaccurate. Plaintiffs' breast beating on this point throughout the litigation is undeterred by the fact that South Carolina is one of only a few states where the percentage of black teachers has always approximated or exceeded the percentage of blacks in the population.

merely *rationally conceivable* that certification and salary formula were based on nondiscriminatory motives, but by showing that the *actual* intent was nondiscriminatory.⁴

While some of the District Court's language refers to the absence of direct evidence for Plaintiffs, none of these statements is inconsistent with proper application of the evidentiary rules Plaintiffs now invoke. Thus, with respect to the 1969 decision to abolish graded certificates, the Court said, "Plaintiffs offer no direct evidence of such an intent, even though one obvious source, the black members of the committee [that recommended the change in the certification system], was apparently available to them." (NEA J. S. App. at 15a.) Although phrased in terms of the lack of direct evidence, this statement simply expresses the Court's finding that the inference of discriminatory intent was rebutted in part by the inference that normally arises from a failure to produce available witnesses. Similarly, other such passages (e.g., NEA J. S. App. at 16a-17a) show only that the Court's conclusion that "the Plaintiffs have not demonstrated the required discriminatory intent" (NEA J. S. App. at 16a) is, in light of all the Court's other statements, nothing more nor less than a finding that the facts taken as a whole—the Plaintiffs' inferences on one hand, the State's evidence on the other—favored the State.⁵ While the law requires that the burden shift to the defendant to rebut a *prima facie* showing by the plaintiff on the

⁴ The United States actually admits that the burden was shifted in its description of the opinion below: "In each case, the court found a lack of 'direct evidence' of intentional discrimination and that any inferences of such discrimination had been rebutted . . . by the State." US J. S., at 15-16 (Emphasis added).

⁵ This Court has used similar language to the same effect in its own decisions. In reviewing the record in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 270 (1977), the Court stated:

In sum, the evidence does not warrant overturning the . . . findings . . . below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision.

issue of intent, the law does *not* require that the Court treat such a showing as an irrebuttable presumption. None but the most selective reading of the District Court's opinion can fail to disclose that the Court required the State to carry the burden of rebuttal on the question of intent and that the State did so to the Court's satisfaction.

Nor does the opinion below indicate that the District Court viewed the series of decisions regarding the NTE made by the State Defendants from 1945 to 1976 in isolation.^{5a} Indeed, the Court expressly noted its awareness of the necessity of viewing the events in sequence, as required by *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U. S. 252, 267 (NEA J. S. App. at 9a), and looked at the State's decisions in sequence and historical context. For example, the District Court carefully examined the preceding events in addressing the 1976 decision to abolish all substandard certificates. (NEA J. S. App. at 16a.) The District Court did not find "a series of official actions taken for invidious purposes,"^{5b} but rather a series of official actions based upon legitimate, nondiscriminatory motives. The Court did not fail to consider the historical pattern of conduct by State officials, but rather found it a pattern of neutral decision-making. Plaintiffs' disagreement is with this factual determination by the trial court.

The District Court, applying the appropriate legal standards and having considered the massive evidence introduced by the State on the question of intent, concluded that the State's decisions regarding adoption and use of the NTE "were not motivated by an intent to discriminate because of race" and there was "no indication whatsoever

^{5a} "Compartmentalized," in the Government's language. US J. S., at 16.

^{5b} *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977).

that the State and its officers were motivated by anything more than a desire to use an accepted and racially neutral standardized test to evaluate . . . teacher applicants." (NEA J. S. App. at 12a, 17a.) Amazingly enough, Plaintiffs seek to challenge this factual determination with their own proposed findings of fact,⁷ which were submitted to, considered, and rejected by the District Court at trial. The proposition that factual determinations made by the trial court cannot be retried on appeal unless "clearly erroneous" hardly bears repeating. See, e.g., *Zenith Corporation v. Hazeltine*, 395 U. S. 100, 123 (1969).

The District Court's finding of a racially neutral purpose behind South Carolina's use of the NTE is amply supported by the record. It has already been noted⁸ that in 1945 the teaching force of South Carolina, black and white, contained large numbers of persons without college degrees, that the quality of teacher training programs then and now has been widely disparate, that the 1945 certification system, the first in the nation to use the NTE, was predicted to result in pay cuts for 67% of the white teachers and raises for 63% of the black teachers, that in 1945 a Federal District Court found the new program to be racially neutral, and that by national standards the achievement required for South Carolina's top certificate was exceedingly low and was even lower for the substandard certificates. Moreover, the 1941 legislative committee report, which first noted the need for racially neutral teacher classification and which the District Court referred to as "an earnest effort in its time" (NEA J. S. App., at 13a), demonstrated the State's effort to improve the quality of education while eliminating racial distinctions in teacher certification and salary.⁹ The report also discloses the committee's consulta-

⁷ See, NEA J. S., at 6-16; US J. S., at 5-15.

⁸ *Supra*, at p. 8-12.

⁹ NEA J. S. App. at 13a.

tion with a number of black educators on the changes to be made.¹⁰ In addition, and as the Court noted (NEA J. S. App. at 10a), the racial composition of the State's teaching force has at all times "closely paralleled" that of the State population as a whole.¹¹ With respect to the 1969 changes

¹⁰ *Supra*, at p. 8.

¹¹ Both Plaintiffs (US J. S., at 18, NEA J. S., at 21) note the decline in the percentage of black teachers over the years but fail to mention the nearly identical decline in the black population of the State.

The District Court specifically noted that during the period from 1945 to the present:

The record before us indicates that during this period, the racial composition of the South Carolina teacher force has closely paralleled the racial composition of the State's population. The 1950 census estimated that 61.1% of the population was white and 38.8% was black. In 1953-54, the State employed a teacher force that was 58% white and 42% black. The 1960 census showed a population that was 65.1% white and 34.9% black. In 1966-67, the teacher force was 65.6% white and 34.4% black. The 1970 census showed a population that was 69.5% white and 30.5% black. In 1975-76, the teacher force was 70.1% white and 29.3% black. NEA J. S. App. at 10a.

If comparison is made between the percentage of blacks in the teaching force and the percentage of blacks holding college degrees in South Carolina, the statistics are even more favorable to the State, as shown by the table below:

Year	Total Persons with 4 Years College	Non-Whites with 4 Years College	Non-Whites Percentage with 4 Years College	Non-Whites, Percentage in Teaching Force
1940	89,899	8,004	.94	37.5
1950	54,220	5,920	1.75	40.9
1960	78,244	10,181	3.03	38
1970	115,119	18,279	4.01	*

* in 1970 no statistical breakdown by race was made of the South Carolina teaching force. However, in 1975-76, the figure was 29.3.

(Source: *U. S. Census of Population: 1950*, Vol. II, Characteristics of the Population, Pt. 40 South Carolina, B, Tables 16, 20; 40-26, 32, 33. *U. S. Census of Population: 1960*, Vol. I, Characteristics of the Population, Part 42, South Carolina, Tables 15, 47; 42-22, 42-96. *U. S. Census of the Population: 1970*, Characteristics of the Population, Pt. 42, Table 46, 42-134; South Carolina, Tables 19, 46; 32-43, 134; Ex. P-93, Attachment A.

in the certification system, it has already been mentioned¹² that black educators participated in those decisions and that the 1968 study committee was concerned with helping those with low test scores to upgrade their certificates rather than with "decimating" the black teaching force. With respect to the 1976 revision, it is undisputed that the decision was based on the expert advice of ETS in light of the NTE validity study, and not on any discriminatory purpose.¹³

The findings of the District Court were made on a massive record. Plaintiffs seek to have this Court review the whole of this record and reach factual conclusions different from those reached by the District Court. The District Court applied the correct legal standards and was convinced by the State's case. This factual determination was not clearly erroneous and Plaintiffs are not entitled to a second trial in this Court.

¹² *Supra*, p. 12.

¹³ The Summary of a Report on a Study of the Use of the National Teacher Examination by the State of South Carolina (Manning Deposition, Ex. D-8, S-MAN-32C) stated:

Based on the judgments of the Knowledge Estimation Panels, a composite score representing the minimum level of academic knowledge that should be necessary for completing teacher training programs and teaching effectively in South Carolina can be set for each of the subject areas covered by the NTE examinations. These composite scores of minimally qualified candidates are set forth in the report, and range from 1006 for Agriculture to 1238 for Media Specialist. In setting a minimal qualifying score as part of the initial certification process, the State can adjust the scores identified by the study by reference to other considerations arising from the measurement process and by reference to other legitimate educational objectives also discussed in the report.

Final determination of the minimum composite scores to be used is the responsibility of the South Carolina State Board of Education and consequently this question cannot be resolved by the data from this study alone. The report provides guidance to the State in addressing this question and the results of the study can effectively contribute to the decision that the State must make concerning the use of the NTE as various factors are weighed by the Board in setting standards for teacher certification in South Carolina.

II

Because there is a manifest relationship between knowledge of subject matter and ability to teach, the District Court was correct in finding that the State may consider mastery of subject matter, as measured by a professionally validated examination, as a factor in certifying teachers and allocating money to supplement their salaries.

A. A State is Entitled to Consider Mastery of Subject Matter in Certifying or Setting Salary Levels for Teachers.

A teacher is one who imparts or conveys knowledge to another. South Carolina requires one who would be a teacher in its public schools to demonstrate knowledge in the three basic areas covered by teaching programs within the State: (1) general education, (2) professional education, and (3) teacher specialty education. The proposition that knowledge in these areas is manifestly related to job performance as a teacher has not been disputed in this litigation.¹⁴ South Carolina assumes that one who is to impart knowledge as a teacher must possess that knowledge himself. It is also assumed that the minimum amount of knowledge required to be an acceptable teacher is something more than the knowledge merely required to teach a given lesson on a given day. In this respect, public school teaching, which involves extensive interaction with young

¹⁴ South Carolina requires all applicants for teacher certification to have completed a minimum of a bachelor's degree at an approved teacher training institution within the State or at an accredited institution outside the State. The Plaintiffs concede that this requirement is lawful and proper in order to insure that public school teachers have the knowledge necessary to teach. Indeed, they contend that graduation from a teacher training program is sufficiently job-related to be the only qualification necessary for certification as a teacher. (NEA J. S., at 33; US J. S., at 32.) Their position demonstrates that Plaintiffs themselves recognize that the subject matter taught in the State's teacher training institutions constitutes job-essential knowledge which a teacher may be required to master before being entrusted with the education of the State's children.

people, is unlike a job in which knowledge of a specific manual skill will tend to insure acceptable performance regardless of whether the applicant is well versed in any area of knowledge beyond the immediate task. South Carolina does not assume that a minimum level of knowledge in itself guarantees effective teaching, but it does know that knowledge gained through academic preparation in the basic areas outlined above is a key element for effective teaching, if not its *sine qua non*.

It cannot reasonably be disputed that the State may use knowledge of subject matter as one criterion for certification of teachers. This Court and others have repeatedly sustained the right of the State to require a minimum standard of knowledge as a prerequisite to licensure in the learned professions.¹⁵ In view of the overwhelming authority on this point, it would seem frivolous to argue that South Carolina may not require teacher candidates to demonstrate a minimum mastery of subject matter on an examination before they are certified. As the Fifth Circuit has stated in discussing bar examinations:

*If a state has the right to insist on a minimum standard of legal competence as a condition of licensure, it would seem to follow a fortiori that it may require a demonstration of such competence in an examination designed to test the fundamental ability to recognize and deal with legal principles.*¹⁶

¹⁵ See, e. g., *Dent v. West Virginia*, 129 U. S. 114 (1889) (medicine); *Stephens v. Dennis*, 293 F. Supp. 559 (N. D. Ala. 1968) (pharmacy); *Lombardi v. Tauro*, 470 F. 2d 798 (1st Cir. 1972), cert. denied, 412 U. S. 919 (1973) (law); *Graves v. Minnesota*, 272 U. S. 425 (1926) (dentistry); *Williamson v. Lee Optical, Inc.*, 348 U. S. 483 (1955) (optometry); *England v. Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (E. D. La. 1965), aff'd mem., 384 U. S. 885 (1966) (chiropractic medicine); and *Milner v. Burson*, 320 F. Supp. 706 (N. D. Ga. 1970) (driver training instruction).

¹⁶ *Tyler v. Vickery*, 517 F. 2d 1089, 1101, cert. denied, 426 U. S. 940 (1976).

Likewise, mastery of subject matter may properly be considered as a factor in allocating funds to supplement salaries. In *National League of Cities v. Usery*, 426 U. S. 833, 848 (1976), this Court, speaking of the interest of States in structuring pay scales for public employees, stated:

The State might wish to employ persons with little or no training, or those who wish to work on a casual basis, or those who for some other reason do not possess minimum employment requirements and pay them less than the federally prescribed minimum wage.¹⁷

Although the federal minimum wage is not at issue here, the considerations described in *Usery* led to the decision to adopt the State salary supplement formula. Put simply, the issue is whether South Carolina may pay less money to persons who do not possess the minimum knowledge necessary for full certification, if it does so without discriminatory purpose and if it uses a fair and accurate measure of minimum knowledge. The District Court concluded that South Carolina may lawfully distinguish between teachers who are academically qualified and those who are not in structuring pay scales.

In 1945, when the salary formula was established, many teachers in South Carolina did not have a college education.

¹⁷ The commonsense proposition that salaries of teachers may rationally and constitutionally be based on differences in individual attainment and worth has long been recognized; *See, e.g., Morris v. Williams*, 149 F. 2d 703 (8th Cir. 1945) (dicta). It is equally settled that teaching is a profession in which the same basic duties may be performed more effectively by one person than by another and that the more effective teacher may be paid more; in other words, the equivalence of positions does not import an equivalence of persons filling them. *Mills v. Board of Education*, 30 F. Supp. 245 (D. Md. 1939) (dicta); *Morris v. Williams*, *supra*.

Because South Carolina faced a severe teacher shortage,¹⁸ it was necessary to employ teachers with less than full certification, although even at that time it was recognized that the system of substandard certificates should eventually be abolished.¹⁹ The effect of the salary allocation formula has been to draw a distinction in pay scale between those who have demonstrated minimum knowledge on the NTE and those who have not. These teachers are not placed in the full salary bracket for State aid until such time as they demonstrate sufficient knowledge to become fully certified.

There are several reasons why tying increases in salary to demonstration of knowledge makes good sense. First, knowledge, while not the only attribute of an effective teacher, is the *sine qua non* of teaching effectiveness. Knowledge does not necessarily come with teaching experience. Experience can improve many facets of a teacher's classroom performance (and accordingly is compensated by the salary schedule), but there is nothing in the teaching of many subjects, particularly at the elementary level, which necessarily adds to an adult teacher's knowledge of subject matter or teaching methods where such knowledge has previously been lacking. For instance, one can muddle through a year of teaching third grade history without being exposed to any more history than is found in the third grade history book; and yet effective teaching of such a subject certainly requires a broader knowledge than that.

¹⁸ For example, in 1946 the teacher supply was said to have reached an all time low. (Exhibit No. P-132 at 73(b).) The "acute shortage" of elementary teachers was termed "startling" in 1949. *See 1949 Annual Report of the Division of Teacher Education and Certification* at p. 7-8.

¹⁹ E. R. Crow, a member of the 1941 committee to study education in South Carolina and a member of the State Board in the forties, wrote in a 1947 article: "A prediction is ventured, based on opinion only, that after a few years when the supply of teachers is more nearly adequate, the function of the examination in certification will be to secure the elimination of applicants below certain educational levels." Ex. D-8, S-MAN-25, p. 462.

Second, even if knowledge did come with experience, there is nothing about experience which makes performance on the NTE more difficult. The NTE are designed to measure knowledge related to the job of teaching. They have been validated for that purpose.²⁰ If an experienced teacher possesses such knowledge, that teacher can demonstrate the knowledge on the NTE, which is specifically designed to measure it.²¹

Third, it is difficult to see how improvement in the amount of knowledge possessed by teachers holding sub-standard certificates could occur without the incentive of higher salaries. The equalization of salaries, which the Plaintiffs apparently prefer, would only have perpetuated the inferior levels of communicative ability and general knowledge which have plagued the education of the youth of South Carolina, black and white, for so many years. As the District Court recognized:

There appears to be no alternative available to the State, within reasonable limits of risk and cost, for providing the incentive necessary to motivate thousands of persons to acquire, generally on their own time and at their own expense, the necessary additional academic training so that they will be minimally competent teachers. Having made

²⁰ The validation of the NTE as measures of knowledge is discussed *infra* at pp. 35-38.

²¹ The record contains no objective evidence to the contrary. Plaintiffs argued strenuously below that the NTE are not designed to be used for in-service evaluation of teaching performance, placing heavy reliance on objections raised by ETS after 1970 that the NTE were not designed to set salaries for experienced teachers. As the District Court apparently perceived, Plaintiffs' argument is beside the point. ETS Guideline (c) (6) recognizes that an experienced teacher's knowledge of a subject matter is properly measurable by the NTE (citing the example of an experienced teacher who wishes to teach a different subject).

(Note continued on following page)

the investment of four years in an undergraduate education, it seems reasonable to try to upgrade the talent of unqualified teachers where possible, rather than rejecting them altogether.²²

Since it is manifest and undisputed that mastery of knowledge at the college level of education is substantially related to the job of teaching, the critical issue in this case is: have the NTE, which purport to measure mastery of subject matter learned in college training programs, been validated for that purpose. The District Court, following the standards of Title VII,²³ as articulated by this Court in *Washington v. Davis*,²⁴ found the NTE valid.

B. The Defendants Clearly Established Below that the NTE Fairly and Accurately Measure Mastery of Subject Matter Taught in Teacher Training Programs in the State of South Carolina.

The District Court began its analysis by stating that

Dr. Winton H. Manning, a vice president of ETS, testified as follows:

Q. Can your National Teachers Examinations be used with teachers, with teachers who have had some teaching experience?

A. Well, they are not designed for use in the evaluation of experienced teachers or teachers with in-service assessments of performance on the job. They could be used for certain purposes for the assessment of knowledge of even those teachers who have had some experience, and they could also be used where on-the-job experience has been extremely limited or where none has been possible or where it becomes administratively impractical or impossible as in the instance of the teacher who may be moving into a state from other parts of the country and where the accessibility of records of in-service teaching performance are simply not available.

Manning Deposition, pp. 48-49, Ex. D-8 (emphasis added). Experienced persons in other professions, including law, are often required to take certification examinations. Courts have sustained such requirements against legal challenge. See, e. g. (*In re Stephenson*, 511 P. 2d 136 (Alaska 1973)).

²² NEA J. S. App., at 43a.

²³ The State defendants do not concede that the United States has standing to bring a "pattern or practice" suit under Title VII, nor do they concede that they are "employers" within the meaning of Title VII, nor that a mere showing of disproportionate racial impact without a showing of discriminatory intent is sufficient to constitute a violation of Title VII.

²⁴ 426 U. S. 229 (1976).

Plaintiffs' evidence of differential racial impact of the NTE shifted the burden of proof to the State to demonstrate that the NTE are a valid measure of job-related knowledge.²⁵ The Court noted "Plaintiffs have not contended or proved that the NTE [themselves] are racially biased. . . ." ²⁶ Thus, the issue for decision was whether the NTE were otherwise a fair and accurate measure of knowledge that could reasonably be required for the job of teaching. The Defendants assumed the burden of demonstrating the validity of the NTE by introducing the professionally designed and administered validity study described above.²⁷

²⁵ NEA J. S. App., at 33a.

²⁶ NEA J. S. App., at 25a.

²⁷ To our knowledge, this is the only case involving the NTE in which a validity study has been introduced. The NTE cases cited by the Government are all distinguishable on that essential point. The NTE cutoff score considered in *Baker v. Columbus Municipal Separate School District*, 462 F. 2d 1112 (5th Cir. 1972), was established "without any investigation or study of the validity and reliability of the examination or the cut-off score" 462 F. 2d at 1114. The Court acknowledged, however, that

a school district has the responsibility of providing the best possible education for its pupils; including efforts to constantly improve its faculty. When a test has a valid function in such a process and is fairly applied to all teachers, it outweighs the fact that it may result in excluding proportionately more blacks than whites. 462 F. 2d at 1115.

In *Walston v. County School Bd. of Nansemond County, Va.*, 492 F. 2d 919 (4th Cir. 1974), the Court enjoined the use of a minimum NTE score requirement on the ground that no evidence of validation had been presented. The Court noted,

[I]t may well be that when properly and fairly applied in appropriate situations, the NTE could qualify as having the "demonstrable relationship" . . . so essential to ensure equal employment opportunity. 492 F. 2d at 927.

In *United States v. Chesterfield County School District*, 484 F. 2d 70 (4th Cir. 1973), the Court condemned the use of an NTE-based certification system that prevented the rehiring of some black teachers, but not because it found reliance on teachers' scores objectionable. A grandfather clause in the certificate classification procedure had created the anomaly that some teachers who were rehired actually had lower NTE scores than the teachers who were dismissed. The Court found untenable the uneven application of the objective standard, and expressly did not reach the issue of the propriety of using the NTE.

There was no validity study at all in *Morgan v. Kerrigan*, 509 F. 2d 580 (1st Cir. 1974).

(Note continued on following page)

The evidence discloses that the NTE are well-developed tests. They have been given several times a year in each year since 1940. Since 1963 they have been revised and updated continuously by means of a detailed, careful, professional process. Over 150 independent experts have contributed to the design of specifications or the formulation of questions in the past five years alone. In addition, 12 ETS testing and subject matter experts are assigned to the NTE program and these experts are provided support by ETS's extensive research effort on all aspects of testing.²⁸ Unlike "Test 21" in *Washington v. Davis*, the NTE are not merely generalized measures of verbal ability and reading comprehension, but have been carefully and specifically designed to test knowledge of the psychological and sociological foundations of education, the methods and principles of teaching, and the specific subject to be taught (art, reading, mathematics, etc.). Plaintiffs make no argument that this knowledge is not essential to effective teaching. The study demonstrates that the NTE consist of suitable samples of this essential knowledge.²⁹

Pickens v. Okolona Municipal Separate School District, 3 Race Relations Law Survey 180 (1971), is reported only in bare summary. In a subsequent proceeding, however, the District Court referred to that case as "legally indistinguishable" from *Baker*, *supra*. See *Pickens v. Okolona Municipal Separate School District*, 380 F. Supp. 1036, 1039 at n. 5 (N. D. Miss. 1974), *aff'd*, 527 F. 2d 358 (5th Cir. 1976).

Georgia Association of Educators v. Nix, 407 F. Supp. 1102 (N. D. Ga. 1976), dealt only with Georgia's use of the NTE to establish a salary "supergrade" for teachers scoring above 1225.

The Government's statement that prior to this case "the courts had consistently struck down such uses of the NTE as racially discriminatory" (US J. S. at 20) is simply not accurate.

²⁸ The process by which the Common Examinations are developed is described in detail in the Manning Deposition. The members of the committee of commissioners for reviewing tests in the NTE Program were identified in Ex. D-8, S-MAN-4. The outside experts who have written questions during this period are listed in Ex. D-8, S-MAN-7. The qualifications of the ETS staff experts assigned to the NTE Program are set out in Exhibits D-8, S-MAN-6 and S-MAN-40.

²⁹ *Supra*. pp. 14-17.

In addition, the District Court had before it evidence that the United States Civil Service Commission has adopted the NTE for use in evaluating applicants for teaching positions in the federal civil service. A study was conducted by the Commission which concluded that the NTE were valid.³⁰ The Commission has made extensive use of the tests and has set cutoff scores far above the level set by South Carolina.

The District Court not only considered the evidence in support of the NTE, but also carefully reviewed a multitude of detailed, technical objections of the Plaintiffs to the validity study. Plaintiffs once again challenge the District Court's evidentiary findings on these detailed points on appeal.³¹ For example, NEA argues that the validity study was defective because some participating panel members had not taught particular subject matters in the classroom. This issue was argued extensively below. The District Court considered the contrary arguments and evidence that the study was implemented in a reasonable fashion,³² that teaching experience was not a necessary (or necessarily the best) qualification for making the relevant judgments,³³ and that the State adopted cutoff scores lower than those

³⁰ Ozur Deposition, Ex. D-2 at 18, 55.

³¹ US J. S. at 33; NEA J. S. at 29-30.

³² As part of its refinement of the study design, ETS solicited the views of four independent experts. Each was asked to comment upon the proposed study design, to advance any criticism which he thought might be directed at the study and to make suggestions for improvement. Each of the four experts submitted detailed comments to ETS. Each of the four supported the overall study design. (E. g., See, Ex. D-8; Ex. D-5.)

³³ There was evidence in the record that ETS considered and rejected this approach in the study design. For the specific reasoning see Manning Deposition, pp. 856-858. ETS was concerned that the perspective of practicing teachers would be too limited to accurately assess the examination. Ex. D-8, at 856-859.

recommended by the study to provide a reasonable margin against judging error.³⁴ The District Court concluded:

We find that the results of the validity study are sufficiently trustworthy to sustain defendants' burden under Title VII.

NEA J. S. App. at 38a.

C. The District Court Correctly Found That Content Validation Satisfied All Applicable Legal Standards.

The evidence introduced in the District Court established that the NTE accurately and fairly measure knowledge that is necessary to teach effectively. In an effort to circumvent the lower court's amply supported holding, Plaintiffs argue, in essence, that such content validity is not enough, as a matter of law. The United States urges that it is necessary to "validate" a requirement of minimum knowledge "in terms of job performance." (See, U. S. J. S. at 31.) Similarly, NEA suggests (in more general terms) that the State was required to but did not show a "sufficient, demonstrable relationship" between the test and the job. (See, NEA J. S. at 31.) These contentions are without merit.

Notwithstanding Plaintiffs' assertions to the contrary, the District Court clearly did require the State to demonstrate that the State's use of the NTE had a fair and substantial relationship to the important and job-related objective of hiring and rewarding qualified teachers.³⁵ After lengthy proceedings, the Court concluded that "there is

³⁴ Ex. D-28.

³⁵ The Court specifically noted that this relationship was "substantial," NEA J. S. App. at 25a, and its lengthy review of the evidence concerning the validity study suggests a search for more than a merely "rational" relationship.

ample evidence in the record of the content validity of the NTE." (NEA J. S. App. at 25a.) It is hardly surprising that the Court did not require scientific proof to demonstrate that NTE scores are predictive of overall success in teaching, since there is no available, or generally accepted, definition of what constitutes success as a teacher.³⁶ The State fully accepts the argument that knowledge is not enough, standing alone, to assure success. On the other hand, such knowledge, as measured by the NTE, is clearly a necessary attribute which the State is entitled to measure and take into account.³⁷

It is sufficient, for Title VII purposes, to establish the content validity of an examination. The EEOC Guidelines, found satisfied by the District Court, expressly authorize the use of an employment procedure validated solely on the basis of content validity, where the procedure measures knowledge necessary for the work in question.³⁸ Furthermore, the Guidelines most recently published by the Department of Justice make clear that content validation is an acceptable approach to the problem of demonstrating that a test has a substantial relationship to employment objectives.³⁹ In *Washington v. Davis*, 426 U. S. at 247, n. 13, this Court said:

It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance.

As already noted, there is no serious dispute in this case that knowledge of the material taught in teacher training programs is essential to effective teaching.

³⁶ The experts for both sides were in general agreement on this point. See, for instance, Plaintiffs' expert Dr. Medley, Medley Deposition, Ex. P-112, p. 107.

³⁷ See cases at n. 15, *supra*.

³⁸ 29 C. F. R. Section 1607.5(a) (1970).

³⁹ 28 C. F. R. Section 4901.12(c) (1976).

The further objection that it was inappropriate to validate the NTE against the content of teacher training programs⁴⁰ was likewise argued and considered below. The District Court observed that the decision to validate against academic training was supported by the testimony of independent testing experts:

The defendants called as an expert witness Dr. Robert M. Guion, the principal author of **Standards for Educational and Psychological Tests**, published by the American Psychological Association and a nationally recognized authority in the field of testing and measurement who testified in an unqualified fashion that in his expert opinion the ETS study design met all of the requirements of the APA Standards, the Division 14 Principles, and the EEOC Guidelines. Two other experts testified similarly, and ETS sought and obtained favorable opinions on the study design, before its implementation, from another two independent experts.⁴¹

Ultimately, the job in question is the job of teaching in South Carolina's elementary and secondary schools. However, since South Carolina requires completion of an approved program, a requirement not challenged by Plaintiffs, there is also involved here the "job" of completing that training program. The "essential knowledge" for either of these jobs is knowledge of the subject matter measured by the NTE.

Arguments similar to the ones raised by the Plaintiffs against the NTE study were rejected by this Court in *Washington v. Davis*. Surely, if, as was held there, an employer may use a test that predicts success in training, an employer may use a test that directly measures such success. This would seem to be a "much more sensible con-

⁴⁰ US J. S., at 36-37.

⁴¹ NEA J. S. App. at 36-a-37a.

struction of the job-relatedness requirement"⁴² than any theory proposed by the Plaintiffs. Thus, it was entirely appropriate and permissible to validate the NTE with reference to the content of teacher training programs, and the amount of knowledge necessary for minimum competence of a teacher, as was done in this case.

D. The District Court Correctly Concluded That the State Is Not Required to Rely Solely on Diplomas, Grades, and Experience in Certifying and Setting the Salary Schedule for Teachers.

Plaintiffs suggest that diplomas and grades provide a better index of minimum competence than results on the NTE. The United States argues that "the best indicator of a prospective teacher's performance in his teacher training program is the prospective teacher's academic record." (U. S. J. S., at 32.) NEA suggests that the State was legally required to alter its system of approving and monitoring programs at state educational institutions. (NEA J. S., at 33.) Plaintiffs' suggestions that the State was required to rely solely on graduation and grades as indices of teacher competence are wholly without merit.

The record below is replete with evidence supporting the State's decision to adopt an objective, merit based process by which to measure candidates' educational accomplishments. First, admission, graduation, and grading practices vary dramatically between differing state institutions.⁴³ Uncontradicted statistics in the record show that in a random period (1973-75) 204 black graduates of four

⁴² 426 U. S. at 251.

⁴³ For example, an expert witness called by Plaintiffs, Dr. Robert Thorndike, stated that:

There is abundant evidence that collegiate institutions in the United States vary enormously both in the level of verbal and quantitative ability of the students whom they admit and in the standards of performance that they require in their course work.

Ex. P-110, P-THO-2, at 2.

colleges with minimal admission standards scored on the average less than 900 on the combined examinations, with some schools' graduates averaging closer to 800.⁴⁴ In contrast, 85 black students at the University of South Carolina and Winthrop College averaged between 1050 and 1100 on the NTE in recent years.⁴⁵ In short, the facts considered below clearly demonstrate that the quality of education, rather than race, accounts for score disparities and that the State had a substantial interest in achieving a statewide, objective measure of competence.

Second, even if standards were uniform throughout all State institutions (as is clearly not the case), grades and graduation, as compared with NTE scores, are based on more subjective and less reliable judgments. Plaintiffs attack the State's validity study on the ground that it involved some subjective determinations concerning the nature of teacher training programs and levels of minimum competence.⁴⁶ The fact is obvious that grades and graduation are unsystematic and unvalidated measures of competence, far more susceptible than the NTE to discrimination.⁴⁷ The State has never suggested that grades and graduation are irrelevant, but rather that they are not

⁴⁴ Ex. D-8, S-MAN-32C, App. A higher score than these averages (920 in the common examination and the Ed. Elem. Sch. TAE, the teaching area in which most applicants in the group of 204 described above were examined), falls in the bottom 3% of applicants nationally (Ex. D-8, S-MAN-9).

⁴⁵ Ex. D-8, S-MAN-32C, App. In addition, an ETS study of teacher training programs in the country indicated that schools whose graduates scored 463 or less on the common examinations alone ranked in the bottom 1% of institutions nationally. While this study only covered about half of the teacher training programs in the country, only ten schools fell below 463, indicating that South Carolina colleges form an inordinately large portion of the low-ranking schools. *Prospectus for School and College Officials* (ETS, 1970).

⁴⁶ US J. S., at 33-34; NEA J. S., at 29-30.

⁴⁷ Dr. Robert Thorndike, comparing the NTE with college grades, stated: "So in this case there is a stable score scale to which judgment can be referred. (This is emphatically not true of course grades from college to college, or even from course to course within the same college.)" Ex. P-110, P-THO-2, at 7 (emphasis in original).

sufficiently reliable to provide the only standard for certification.

The NTE also provide a better measure of knowledge for the purposes of the salary formula than any alternative proposed by the Plaintiffs. There is no procedure which can reliably and objectively measure alleged gains in knowledge by experienced teachers other than tests such as the NTE. Subjective evaluations, which may have a place in judging the external aspects of a teacher's classroom performance (such as oral presentation, classroom control, leadership ability, etc.), are an unsatisfactory method of judging a teacher's knowledge of his subject matter and his general knowledge. Subjective evaluations can only be conducted randomly, and a teacher's performance on any given day may be a misleading indicator of his overall level of knowledge.

No alternative to the NTE would provide the uniformity of measurement that is achieved by the statewide administration of an objective, standardized test. Even if knowledge were capable of being measured accurately through subjective evaluations conducted by supervisors, the standards applied by supervisors at the local school district level would vary widely from district to district and would probably result in a general lowering of the knowledge requirement. Districts with less than fully qualified teachers would come to regard (and to pay) those teachers as fully qualified because of the lack of objectively measured qualities. The possible ignorance of some teachers

would be effectively condoned,⁴⁸ much to the detriment of the pupils, who would represent yet another generation with inadequate schooling.

In summary, this is not a case in which the State improperly rejected any less biased or more valid alternative procedure for making certification and salary decisions in a manner serving its interest in quality public education. To the contrary, the District Court expressly found, on the basis of substantial evidence, that the subjective and variable information provided by grades, diplomas, and experience did not satisfy the State's legitimate needs. (NEA J. S. App. at 42a.) Further, the District Court's findings that the NTE were fair and accurate measures of job-related knowledge, used without a discriminatory purpose, are amply supported by extensive evidence submitted by the State. Surely the State may lawfully take the best steps available to it in a wholly nondiscriminatory way to determine the qualifications of those charged with educating its school children. Defendants submit that no principle of law requires them to do otherwise.

⁴⁸ In addition, there is no real guarantee that the evaluators themselves would recognize either knowledge or ignorance if they saw it. Dr. William W. Savage, former dean of the USC College of Education, testified:

I will contend and I have a great deal of support for this, that we have a number of school administrators who, in terms of evaluating whether or not the teacher has any competency at all in the English language, can't evaluate the teachers because they don't know the English language either.
Savage Deposition, Ex. D-9 at 49.

CONCLUSION

For the reasons stated above, these appeals present no important questions of fact or law meriting plenary review by this Court. The judgment below should, therefore, be affirmed without further proceedings.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,
Post Office Box 11549,
Columbia, South Carolina 29211,

RANDALL T. BELL,
University of South Carolina,
School of Law,
Columbia, South Carolina 29208,

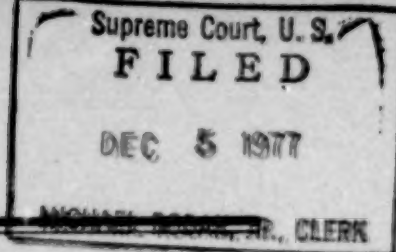
KENNETH L. CHILDS,
Suite 920, Bankers Trust Tower,
Columbia, South Carolina 29201,
Attorneys for Appellees.

OF COUNSEL:

CONSTANGY, BROOKS & SMITH,
Suite 920, Bankers' Trust Tower,
Columbia, South Carolina 29201.

KATHERINE W. HILL,
KENNETH P. WOODINGTON,
Assistant Attorneys General,
Post Office Box 11549,
Columbia, South Carolina 29211.

No. 77-422



IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

NATIONAL EDUCATION ASSOCIATION ET AL.,
Appellants,
v.

STATE OF SOUTH CAROLINA ET AL.,
Appellees.

On Appeal from the United States District Court for the
District of South Carolina, Columbia Division

**BRIEF FOR THE NATIONAL EDUCATION
ASSOCIATION ET AL. IN OPPOSITION
TO APPELLEES' MOTION TO AFFIRM**

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
*Attorneys for the National
Education Association*

CRAIG K. DAVIS
1501 Washington Street
Columbia, South Carolina 29201
*Attorney for the South
Carolina Education
Association and the
Individual Appellants*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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**BRIEF FOR THE NATIONAL EDUCATION
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The State parties have joined issue with our jurisdictional statement by filing a motion to affirm. As we show below, that motion does not come to grips with important legal issues that make this a proper case for plenary appellate review.

**I. THE STATE'S MOTION TO AFFIRM DISTORTS
THE DISTRICT COURT'S RULING ON PURPOSEFUL
DISCRIMINATION.**

In our jurisdictional statement we showed (pp. 24-25) that the district court was required to apply the burden-shifting principle adopted by the Fourth and Fifth Circuits and embraced by this Court in *Keyes*—namely that

where, as here, plaintiffs show that public officials have adopted policies that exclude a disproportionately large number of black educators from employment coincident with desegregation, that showing thrusts upon school officials the "burden of justifying [their] conduct by 'clear and convincing evidence.'" Further, in discharging that burden, "it is not enough . . . that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative [or discriminatory] intent was not among the factors that motivated their actions." *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 209-10 (1973). See *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189, 192 (4th Cir. 1966) (en banc).

The State asserts that a "fair reading of the opinion of the District Court demonstrates that the Defendants were required to, and did, bear the burden of showing nondiscriminatory purpose in response to the *prima facie* case of the Plaintiffs" (Motion 19-20). The district court's opinion, however, gives no ground for concluding that the three-judge panel ruled either (a) that the plaintiffs had established a *prima facie* case of purposeful discrimination, or (b) that the State had proved "by clear and convincing evidence" that racial motivation was not a factor in the adoption and enforcement of the certification requirements.¹

¹ The State implies that the district court shifted the burden of proof since "[t]he State never disputed its burden of coming forward with the rebuttal evidence on the question of intent . . ." (Motion 20). The State's premise is false. In the trial court, the State sought to distinguish the burden-shifting cases cited by plaintiffs, rather than conceding that they govern this case. Thus, in Plaintiff's Conclusion of Law No. 10, plaintiffs showed that *Chambers* and *Keyes* established a burden-shifting principle and that that principle had been applied to "cases involving the use of NTE cutoff scores in *Walston v. Nansemond County School Board*, 492 F.2d 919, 924 (4th Cir. 1974); *United States v. Chesterfield*

In reviewing the evidence relating to purposeful discrimination, the district court did not at any time say that the burden had shifted to the State. Elsewhere, when the court concluded that the burden of proof had shifted, it said so plainly. Thus, in the Title VII branch of the case, the court was careful to state that the burden of proof shifted to the State in connection with its certification use (NEA App. 33a) and its pay use (*id.* 43a). Furthermore, the court did not cite *Keyes* or the relevant cases from its own circuit, which hold that the adoption of NTE score requirements coincident with desegregation shifts the burden. *Walston v. Nansemond County School Board*, 492 F.2d 919, 924 (4th Cir. 1974); *United States v. Chesterfield County School Dist.*, 484 F.2d 70, 72-73 (4th Cir. 1974). Cf. *Chambers v. Hendersonville City Board of Education*, *supra*.

Most important, in reviewing the State's 1969 decision—which is the pivotal decision respecting use of the NTE as a certification instrument²—the trial court used language that negates any notion that it placed the burden of proof on the State much less that it required the State to meet its burden by "clear and convincing evidence":

County School District, 484 F.2d 70, 72-73 (4th Cir. 1973); and *Baker v. Columbus Municipal Separate School District*, 329 F.Supp. 706, 720 (N.D. Miss. 1971), *aff'd.* 462 F.2d 1112 (5th Cir. 1972)." In its trial brief (pp. 24-25), the State countered that "[t]he cases cited in plaintiffs' proposed conclusion of law No. 10" are distinguishable and that "it is sheer fantasy to suggest that 1969 requirements were in any way similar to the actions of the defendants in other cases involving the NTE."

² The State agrees with us that it used the NTE as an instrument for fixing pay levels between 1945 and 1969 (when a dual system of public education was in effect) and that it first used the NTE to bar a substantial number of persons from certification in 1969 (when the schools were undergoing desegregation) (Motion 11-12 and n. 30).

"We are unable to find any intent to discriminate with respect to this decision. *Plaintiffs offer no direct evidence of such an intent*, even though one obvious source, the black members of the committee, was apparently available to them. The State's authority to re-define minimal competence from time to time cannot be reasonably questioned." (NEA App. 15a; emphasis added.)³

According to the State, "[a]lthough phrased in terms of the lack of direct evidence, this statement simply expresses the Court's finding that the inference of discriminatory intent was rebutted in part by the inference that normally arises from a failure to produce available witnesses" (Motion 21). In other words, the trial court held that plaintiffs' prima facie case was rebutted in part by plaintiffs' own failure to put on additional witnesses. There, however, is no authority for the proposition that a prima facie case of purposeful discrimination is overcome by the plaintiffs' failure to present additional evidence. The *Keyes-Chambers* burden-shifting rule does not require a plaintiff to put on all available evidence. Nor is there authority for the proposition that a plaintiff's failure to call black witnesses who were equally available to both sides constitutes evidence, much less "clear and convincing evidence," that race was not among the factors that motivated the defendant school officials.⁴ Thus, the

³ To the same effect see the trial court's statement that, "plaintiffs have not demonstrated the required discriminatory intent with respect to any of the specific decisions setting certification standards based on NTE scores" (NEA App. 16a-17a).

⁴ It is well established that when witnesses are "equally available" to both parties, no inference is allowable from the failure to call such witnesses. II *Wigmore on Evidence* § 288 (3d ed. 1940); Divitt & Blackmar, *Federal Jury Practice and Instructions* § 17.19 (3d ed. 1977). Wigmore also points out that as a matter of logic the failure to produce witnesses is "open to an inference against both parties, the particular strength of the inference against either depending on the circumstances." II *Wigmore, supra*, § 288. If, as the State now concedes, it had the burden of rebutting plaintiffs' prima

State's convoluted interpretation of the district court's opinion is neither true to the text of the opinion, nor to the applicable principles of law that the State claims were being applied.

In sum, the district court did not say that plaintiffs' case foundered for want of "rebuttal" evidence, or that the State had met plaintiffs' prima facie case by "clear and convincing" evidence. The trial court made no mention of burden-shifting principles and said plaintiffs offered no direct evidence of discriminatory intent. Very simply, in deciding the issue of purposeful discrimination, the court below ignored the controlling decisions of this Court and the courts of appeals, and the State now agrees that those decisions are applicable.

II. THE STATE'S MOTION DOES NOT COME TO GRIPS WITH THE BUSINESS NECESSITY ISSUE.

The record shows that 47 States do not use cutoff scores on a standardized examination as a criterion for initial entry certification (NEA J.S. 33). The record also shows that ETS admonishes test users not to use cutoff scores to determine levels of pay (*id.* at 26-27). That evidence starkly presents the issue of whether the State's uses of NTE cutoff scores are justified by "business necessity" as Title VII requires. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Dothard v. Rawlinson*, 45 U.S.L.W. 4888, 4890-91 and n. 14 (June 27, 1977). The State has not dealt frontally with this issue.

facie case, then the failure to produce witnesses from the 1968 committee—black or white—raises an inference against the State. Moreover, experience teaches that it would have been most unlikely for the white members of the 1968 study committees to have confided to the black members that the whites were supporting the proposed score changes in order to frustrate desegregation—though this assumption lies at the heart of the argument that an inference may be drawn from plaintiffs' failure to call black members of the committee.

A. *Pay.* The State does not explicitly contend that there is a "business necessity" for using NTE scores to fix pay brackets. Instead, the State presents the case as though a lesser standard applies, saying that "there are several reasons why tying increases in salary to demonstration of knowledge makes *good sense*" (Motion 29; emphasis added). In this connection, the State first theorizes that "knowledge does not necessarily come with teaching" (*id.*). The State's own evidence contradicts this undocumented assertion. *Report of Investigation of Educational Qualifications of Teachers in South Carolina*, p. 262 (1944) (PX-1). See also the testimony of ETS, Manning Dep. p. 857. Second, the State asserts in the alternative that "even if knowledge did come with experience" the NTE will appropriately measure knowledge gained by the teacher on the job (Motion 30, 40). This assertion is contrary to the test developer's testimony (NEA J.S. 26-28) and the testimony of the State's primary testing expert, Dr. Robert Guion, who testified:

"I am of the opinion that a test that has been validated in the way—has been developed and validated in the way that the N.T.E. has is not an appropriate instrument for making personnel decisions with experienced teachers or for making the kind of predictions that are implied when you say a person with a higher score is going to be a better teacher than the person with a lower score." (Guion Dep., p. 118.)

Third, the State attempts to buttress its notion of "good sense" with the assertion that "it is difficult to see how improvement in the amount of knowledge possessed by teachers holding substandard certificates could occur without incentives of higher salaries" (Motion 30). This argument overlooks the fact that the State can and does offer pay increases for taking further training at a college or university. In addition, the State conducts in-service training for teachers (Williams Dep. 26-27). The

NTE is not necessary to either of these improvement programs.

The fact is that where experienced teachers with similar training and experience are performing the same tasks, and are being evaluated as satisfactory or better, neither "business necessity" nor even "good sense" support a policy that singles out some of these teachers and pays them less than their peers because of their scores on the NTE Common Examinations. The State's pay policy is all the more insupportable since that policy has been condemned by the test developer as a misuse of the NTE, and since four committees which advised the State Board of Education and the State Board itself have recommended that the policy be discontinued.

B. *Certification.* The State presents its justification for the certification use as though the State needed only to show a "substantial interest" rather than a "business necessity" for its certification use (Motion 39). The State urges that because of disparities among the teacher training programs that the State monitors and approves, "the State had a substantial interest in achieving a statewide, objective measure of competence" (Motion 39; emphasis added). The State emphasizes that the measure of competence should be "objective" and that grades are based on "more subjective and less reliable judgments" than are NTE cutoff scores (Motion 39).

To be sure, the number 1132 is "objective"—i.e., the number is free of personal or subjective feelings. But the process by which that number became a cutoff score dividing "competent" from "incompetent" elementary teachers was not objective. To set such cutoff scores panel members were asked to conjure up a "hypothetical" group of persons. The persons in the imaginary group were to fulfill not one, but two criteria—they were to be (a) minimally qualified to teach effectively and (b) minimally qualified to complete a teacher training program.

These panel members were then to perform a further mental feat: each was to determine what percentage of his imaginary group would know the answer to each item on the NTE. The exercise was not only highly subjective but also highly speculative, for the panel members had not taught 60 percent of the items about which they were asked to give an opinion. (NEA J.S. 14-15.) Grades, to be sure, are subjective, but at least they represent an effort by these same panel members and their peers to evaluate the competence of real people on subject matter that the professors actually teach to them.⁵

The State also urges that it is "not required to rely solely on diplomas, grades and experience" or "to alter its system of approving and monitoring educational programs at [its] institutions" (Motion 38). We have not suggested that the State is required to do so. But, in view of the facts that these alternatives do exist and indeed are widely used throughout the nation, and that only South Carolina, North Carolina and Mississippi require candidates for initial entry certification to meet a cutoff score requirement on a standardized test, there can be no reasonable arguments that "business necessity" justifies using NTE cutoff scores which will produce a candidate pool that is 96 percent white and 4 percent black.⁶ *Dothard v. Rawlinson*, 45 U.S.L.W. 4888, 4890-91

⁵ The only expert called by both sides, Dr. Robert Thorndike, testified that it is "as reasonable" to rely on grades as a definition of competence as to rely on cutoff scores generated from the "unanalyzed impressions upon which the [panel] judges were operating" (Thorndike Statement 12).

⁶ The State disputes our "characterizations of the impact that the NTE has on black candidates," saying that the above figures are "statistically unreliable" and that our conclusions are "inaccurate" (Motion 20 n. 3). "Our" figures are derived from data that ETS supplied to the State and that the State relied on when it calculated the racial impact of the 1976 NTE cutoff scores in advance of their enforcement (Exh. P-M-80D; Maynard Dep. V, p. 46). Both the court (NEA App. 35a) and the State (Motion 16-17) make a point

n. 14 (decided June 27, 1977) (an employment practice with disparate racial effect "must be shown to be *necessary* to safe and efficient job performance to survive a Title VII challenge").

CONCLUSION

For the reasons set forth in the jurisdictional statements of the plaintiffs, the Court should note probable jurisdiction and set Nos. 77-422 and 77-543 for plenary consideration.

Respectfully submitted,

STEPHEN J. POLLAK
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
*Attorneys for the National
Education Association*

CRAIG K. DAVIS
1501 Washington Street
Columbia, South Carolina 29201
*Attorney for the South
Carolina Education
Association and the
Individual Appellants*

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

of the fact that the State took account of this racial impact in setting the 1976 cutoff scores.

The State also says that the racial impact data cited by the plaintiffs in their jurisdictional statement "rest on a data base of two (2) persons who failed to meet the new scores on two area exams (Spanish and Chemistry, Physics and General Science) (Motion 20 n. 3). The State is in error. The data base that the State offered in evidence (Exh. P-80D) consists of the scores for 593 black and 3,615 white candidates for certification who took the NTE between November 1973 and July 1975. In Appendix A hereto, we have charted the State's data showing the racial impact that the 1976 score requirements would have had if those requirements were applied to this group of 4,208 recent candidates for certification.

**EFFECTS OF 1976 CUTOFF SCORE REQUIREMENTS IF APPLIED
TO SOUTH CAROLINA CANDIDATES TAKING NTE BETWEEN NOVEMBER 1973 & JULY 1975**

Test	Number of Candidates By Race Taking NTE In 2 Year Period (November 1973 to July 1975)		Average Number Of Blacks Certified Per Annum	Average Number Of Whites Certified Per Annum	Percentage Of Blacks Eliminated By New Cut- Off Score	Percentage Of Whites Eliminated By New Cut- Off Score
	Black	White				
Agriculture	0	10	N/A	4.5	N/A	10
Art Education	8	91	.5	38.0	88	17
Biology & General Science	32	104	4.5	47.0	72	10
Business Education	59	81	6.0	32.5	80	20
Chemistry, Physics & General Science	1	27	0	12.0	100	11
Early Childhood Education	46	512	7.0	225.0	70	12
Education in the Elementary School	155	1182	9.5	413.5	88	30
Education of Mentally Retarded	21	154	3.0	56.0	71	27
English Language & Literature	35	235	5.5	111.5	69	5
French	4	43	.5	13.5	75	37
German—Common Examinations	0	9	N/A	3.0	N/A	33
Home Economics Education	18	57	.5	26.5	94	7
Industrial Arts Education	5	21	.5	10.5	80	0
Mathematics	40	154	2.5	63.0	88	18
Media Specialist	12	11	.5	5.0	92	9
Music Education	16	148	1.5	69.0	81	7
Physical Education	52	329	4.0	107.0	85	35
Social Studies	88	396	7.5	154.5	83	22
Spanish	1	30	0	9.5	100	37
Totals	593	3594	53.5	1401.5		